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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 947

PAULINE MAAS, individually, and as Guardian *ad Litem* of EMMANUEL AUGOSTOUPOULOS, ANASTASIA MARATOU and DIMITRIOS PAGISTAKIS, Defendant and Third Party Plaintiff,

vs.

Petitioner,

THE BOARD OF EDUCATION OF MOUNTAIN LAKES, Plaintiff,

and

ALTON C. DICKIESON, HERMAN E. NOWECK, GORDON P. McCOUCH, CHARLES H. GREBENSTEIN, DAVID G. KINGSLEY, W. CULLEN MOORE, MARGERY HOWARD, ELIZABETH YONKERS, WILLIAM R. FAHRINGER, FRED R. JACKSON, Jr., ROGER P. PETTIT, MILDRED ROTH and WINIFRED NEILL, members of the MOUNTAIN LAKES BOARD OF EDUCATION, and HARRY W. WENNER, Superintendent of Schools of MOUNTAIN LAKES, Third Party Defendants,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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E R R A T A

In the Supreme Court of the United States

October Term, 1959 - No. 947

PAULINE MAAS, etc., Petitioner,

vs.

BOARD OF EDUCATION, etc., et al.,

Respondents.

TO BE INSERTED IN THE BEGINNING OF PETITION FOR A WRIT OF CERTIORARI

P. 15 - 9th line from bottom:
Change "is" to "it".

8th line from bottom:
Change (D36a-30, A__a) to
(D36a-30, p. 9, supra)

P. 20 - Last line of 1st paragraph:
Change "this" to "the"

P. 30 - Footnote 9(a) should read:
"Decided in 1948 . . . . ."

P. 33 - 2nd paragraph, 1st line, should read:
"The Appellate Division however (A17a)
examined . . . "

IN THE

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OCTOBER TERM 1959

No.

PAULINE MAAS, individually, and as Guardian *ad Litem* of Emmanuel Augostoupoulos, Anastasia Maratou and Dimitrios Pagistakis, Defendant and Third Party Plaintiff,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MOUNTAIN LAKES,

Plaintiff,

and

ALTON C. DICKIESON, HERMAN E. NOWECK, GORDON P. McCOUCH, CHARLES H. GREBENSTEIN, DAVID G. KINGSLEY, W. CULLEN MOORE, MARGERY HOWARD, ELIZABETH YONKERS, WILLIAM R. FAHRINGER, FRED R. JACKSON, JR., ROGER P. PETTIT, MILDRED ROTH and WINIFRED NEILL, members of the Mountain Lakes Board of Education, and HARRY W. WENNER, Supt. of Schools of Mountain Lakes, Third Party Defendants,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Legend: "A—a" refers to Appendix annexed hereto;

"D—a" refers to Appendix of Defendant-Petitioner;

"P—a" refers to Appendix of Plaintiff and Third Party Defendants-Respondents.

Unless otherwise indicated, emphasis or underscoring is ours.

To the Honorable, the Chief Justice of the United States, the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court, entered in the above entitled case on February 22, 1960 (A1a).

Opinions of the Courts Below

The *per curiam* opinion and judgment of the New Jersey Supreme Court adopting the opinion and affirming the judgment of the New Jersey Superior Court, Appellate Division, is reported in 31 N. J. 537, 158 Atl. 2nd 330. The opinion and judgment of the Appellate Division of the New Jersey Superior Court is reported in 56 N. J. Super. 245, 152 Atl. 2nd 394. Opinions and judgments rendered by the Chancery Division of the New Jersey Superior Court, a) when the motion to vacate interlocutory injunction was denied; and b) after trial, were not reported. All of the opinions of the courts below, whether reported or not, are printed in the appendix annexed hereto.

Jurisdiction

This petition is submitted pursuant to Revised Rules No. 23 of this Court to satisfy the Court that a Federal question is presented and that it should take jurisdiction.

The judgment of the New Jersey Supreme Court dated February 22, 1960 was entered on February 22, 1960, which judgment affirmed on the merits, the judgment of the New Jersey Superior Court, Appellate Division, dated June 22, 1959, entered on June 22, 1959. The judgment of the Appellate Division affirmed all the orders of the New Jersey Superior Court, Chancery Division, from which defendant-petitioner appealed, viz:

1) The judgment of the New Jersey Superior Court, Chancery Division, dated January 22, 1959, filed on January 30, 1959, which

a) enjoined and restrained the defendant, Pauline Maas, from entering three Greek foster children, viz. Emmanuel Augostoupoulus, Anastasia Maratou and Dimitrios Pagistakis, in any of the public schools in Mountain Lakes, New Jersey, unless they were immunized against diphtheria;

b) rendered judgment in favor of the plaintiff, Board of Education of Mountain Lakes, and against the defendant, Pauline Maas, on her counterclaim;

c) granted the motion of the third party defendants (individual board members) for involuntary dismissal of the third party complaint, filed by third party plaintiff, Pauline Maas; and

d) denied the motion of the defendant, Pauline Maas, to suspend the operation of the injunction pending the outcome of an intended appeal;

2. Judgment of the Chancery Division rendered October 11, 1957, filed on October 30, 1957, granting an interlocutory injunction to the plaintiff, restraining the defendant from entering and delivering her three unimmunized foster children in the Mountain Lakes public schools, and summarily

denying defendant's application for a stay of execution pending the outcome of an appeal;

3. Judgment of the Chancery Division rendered on September 12, 1958, filed on September 23, 1958, denying defendant's motion to vacate the injunction.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

Questions Presented for Review

1. Where the Statement of Purposes attached to the bill which sought to amend the compulsory vaccination and immunization statutes recited that its purpose was to uphold "religious freedom by virtue of the guarantees afforded by the constitutions of the United States and of this State (New Jersey), is it a denial of religious freedom and of equal protection of the laws for a local board of education and the state courts to sweep aside such purpose and ignore its obvious mandate?

2. Where no "clear and present danger" existed or exists; where there is no basis in fact for the repeal of a state grant of religious exemption, was such repeal of a First Amendment freedom a denial of due process? Was such repeal an arbitrary and capricious act in excess of the Board's powers for which they are answerable in damages?

3. Where the Revised Rules of the New Jersey Supreme Court provide for 5 days notice of motion in applying for an injunction and where no irreparable harm is shown and no special circumstances exist for abrogating the rules, is it a denial of due process to grant an injunction barring three healthy children from school, on two days' notice, under an order to show cause?

4. Where no record exists showing how much time, if any, petitioner was accorded at the hearing on the return day of order to show cause why an interlocutory injunction should not be issued, is it a denial of due process for the appellate courts to assume that petitioner had ample opportunity to be heard?

5. Where no irreparable harm has been shown to have been caused by the attendance of three successive sets of unimmunized foster children, with three children in each set, may the Court grant an interlocutory injunction to keep the third set of three healthy children from school, for all time, when the foster parent invokes the statutory grant of religious exemption from the requirement of immunization?

6. Does a foster parent have the same rights, duties and responsibilities with respect to her foster children as a natural parent or guardian has?

7. Where the state courts and the respondents profess to rely upon *Jacobson* v. *Maas*, which excluded expert testimony that would dilute legislative intent, may the trial court admit expert testimony to bolster local repeal of state legislation?

8. Where full direct examination of alleged expert was permitted by the trial court, is it a denial of due process to shut off cross-examination of such expert by the taking of judicial notice that a difference in medical opinion exists as to the efficacy of immunization?

9. Having cut off cross examination of the expert, is it a denial of due process to give full weight to the testimony of such expert and to substitute another judicial notice for the one it took?

10. Where a school board has exceeded its power in repealing a state grant of religious exemption and violates

other enumerated laws, is it liable in damages for excluding three healthy children from school? Are the individual board members liable for such exclusion?

11. May the Court grant a final injunction when the state requirements for the issuance of a final injunction have not been met?

12. Where final injunction is issued after trial on a "remote" "possibility" of resultant disease, does the question of damages to be paid by the school board and its individual members for the original wrongful issuance of an interlocutory injunction on short notice, become moot?

13. Where defendant petitioner has exhibited a plan of bringing foster children to this country for a year's stay or longer, does the return to their mothers, of the last set of children who have been kept out of school for two years, render moot the questions of denial of religious freedom, denial of due process and denial of equal protection of the laws? Must the defendant go through the same series of suits and appeals with these same children and with each group of children she hereafter brings to this country, when she seeks to enter them in the local schools?

Constitutional Provisions and Statutes Involved

United States Constitution—1st Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution—14th Amendment, Par. 1:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

New Jersey Constitution—Art. 1, Par. 3:

"3. *Rights of conscience; religious freedom*

3. No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform."

New Jersey Constitution—Art. 1, Par. 5:

"5. *Denial of rights; discrimination; segregation*

5. No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.".

N.J.S.A. 18:14-52. Vaccination of teachers and pupils

"A board of education may exclude from school any teacher or pupil who has not been successfully vac-

cinated or re-vaccinated; unless the teacher or pupil shall present a certificate signed by the medical inspector appointed by the board of education that the teacher or pupil is an unfit subject for vaccination, *but a board of education may exempt a teacher or pupil from the provisions of this section, if said teacher or the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed vaccination interferes with the free exercise of his religious principles.*"

(As amended L. 1952, c. 152, p. 513, Sec. 1. Italicized matter connotes amendment provision.)

N.J.S.A. 18:14-64.2. Immunization to diphtheria

"The board of education of any school district may require immunization to diphtheria as a prerequisite to attendance at school and it may at its discretion require or waive proof of immunity. Any pupil failing to comply with such a requirement may be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive the immunizing treatment, or a certificate signed by a physician or by the board of health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria; provided, that in either or any such instance the certificate and the test employed shall have the approval of the school medical inspector.

"*A Board of Education may exempt the pupil from the provisions of this section if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles.*"

(As amended L. 1952, c. 153, p. 514, Sec. 1. Italicized matter connotes amendment provision.)

Statement of Purposes attached to the bills when the amendments were introduced:

"The purpose of this bill is to give a board of education which has exercised its right to exclude certain unimmunized pupils from the public schools, the further discretionary right not to exclude any pupil, from the public schools when the pupil, parent or guardian of the pupil is an adherent of a well-recognized religion, and when the parent or guardian exercises his religious beliefs in objecting in writing to immunization to diphtheria of his child or ward. This bill will be consonant with the tendency of the Legislature and administrative bodies to uphold religious freedom by virtue of the guarantees afforded by the Constitutions of the United States and of this State."

"Policy" adopted by Board—June 17, 1957 (D36a-30):

"The Board of Education of Mountain Lakes shall require vaccination against smallpox and immunization to diphtheria as prerequisites for attendance at school.

"Any pupil failing to comply with such requirements shall be excluded from school, unless the pupil presents a certificate signed by a physician or by the Board of Health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria, provided that in either or any such instance the certification and the test employed shall have the approval of the school medical inspector."

N.J.S.A. 18:14-64.10. Immunization against poliomyelitis; exceptions

"The board of education of any school district may require all pupils to have received immunizing treatment against poliomyelitis as a prerequisite to attendance at school, and it may at its discretion require or waive proof of immunity, except as hereinafter provided.

"Any pupil failing to comply with such a requirement may be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive such immunizing treatment.

"A board of education shall exempt the pupil from the provisions of this act if the parent of guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles."

L. 1957, c. 133, p. 515, Par. 1.

Revised Rules of the New Jersey Supreme Court:

"1:2-8. *Notice of Appeal; Preparation of Transcript*

"a) Where an appeal is permitted, it may be taken in any cause by serving a copy of a notice of appeal upon the attorney for the respondent and, if the appeal is from a judgment of a trial court, by serving a copy of said notice upon the trial judge by mail and filing the notice in duplicate with service acknowledged on one copy, or with an affidavit of service annexed thereto, with the court from which the appeal is being taken. The service of the copy of said notice upon the trial judge shall not be a jurisdictional requirement of the appeal. * * *"

"1:10-1A. *Certification on Motion of a Party of Appeals Pending Unheard in the Appellate Division*

"a) Where an appeal is pending unheard in the Appellate Division and all briefs have been filed any party thereto may serve and file with this court, within 5 days of the filing of the last brief, a motion for certification. Any opposing party within 5 days of the service of such motion may serve and file a statement in opposition to certification. * * * If the motion be granted the appeal will then proceed to hearing before this court upon the briefs and appendices prepared for the Appellate Division, 6 more copies of which shall be filed."

"2:2-3. *Appeals from Interlocutory Judgments, Orders or Determinations*

"a) This court shall have the power to permit in its discretion an appeal to be taken from any interlocutory order or judgment or from an interlocutory decision or action of any state administrative agency (other than those governed by Rules 5:2-5 and 5:2-9) when, in the opinion of the court, the grounds of appeal are substantial. Application for leave to take such appeal shall be made by notice of motion together with supporting affidavit, and brief, if any, which shall be served and filed within 10 days from the order or judgment sought to be appealed."

"4:67-2. *Temporary Restraining Order; Notice; Hearing; Duration*

"No temporary restraining order shall be granted without notice to the adverse party or his consent unless it appears from specific facts shown by affidavit or by the verified complaint that immediate, substan-

tial and irreparable injury, loss or damage will probably result to the applicant before notice can be served and a hearing had thereon. Such an order granted without notice shall give the adverse party leave to move for the dissolution or modification of the restraint on not more than 2 days' notice; and shall expire by its terms within such time after entry, not to exceed 10 days in case of resident respondents, or not to exceed 35 days in case of non-resident respondents, as the court may fix, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, a motion for an interlocutory injunction shall be set down for hearing at the first motion day following the entry of the order, for which due notice can be given; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction and, if he does not do so, the court shall dissolve the temporary restraining order, unless good cause is shown to the contrary. Rule 4:67-2 shall not govern motions made under Rules 4:88-5 and 4:88-12 relating to proceedings in lieu of prerogative writs."

"4:67-3. *Interlocutory Injunction; Motion*

"Unless a temporary restraint or special directions for service are sought, or other exceptional circumstances appear, an interlocutory injunction shall be applied for on motion without securing an order to show cause. Briefs shall be submitted."

"4:67-5. *Form and Scope of Injunction or Restraining Order*

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; * * *"

Statement of the Case

A. Legal Background

Since 1903, New Jersey has had a statute (N.J.S.A. 18:14-52) leaving it to the discretion of a local board of education whether to require vaccination against smallpox. In 1939 the New Jersey Legislature passed another statute (N.J.S.A. 18:14-64.2) giving a local board of education a similar discretion with respect to immunization against diphtheria. Then in 1952, these laws were amended by adding an exemption feature to both N.J.S.A. 18:14-52 and 18:14-64.2. These amendments gave a local board of education the discretion to exempt pupils from the requirement of vaccination and immunization if their parents or guardians objected thereto in writing, on religious grounds.

When the bills granting exemption from the requirement of vaccination and immunization were introduced, a Statement of Purposes was attached which showed the legislative purpose to be "to uphold religious freedom" in consonance with federal and state constitutions (p. 9 *supra*).

In 1957, N.J.S.A. 18:14-67.10 was passed, giving a local board of education the discretion whether to require immunization against poliomyelitis, but making it mandatory to grant a religious exemption upon the written request of parent or guardian. No statement of purposes was attached.

B. Factual Background

1. Events Before Litigation Commenced

Defendant, a resident of Mountain Lakes, Morris County, New Jersey, has been a Christian Scientist since December 1933 (D116a-37). As such Christian Scientist she relies for health and healing wholly on prayer and on her faith in Jesus Christ, and is conscientiously opposed to immunization or other forms of medication (D117a-18).

In September 1957, defendant sponsored three children from Greece, under the Foster Parents Plan, viz., Emmanuel Augostoupoulos, Anastasia Maratou and Dimitrios Pagistakis, of whom she is the foster parent (D119a-31) for what was to have been a 12 month stay. Their stay was subsequently extended. This group is the third set of three children in each set that she has received from Greece, for a year's stay.

The trial court has found the defendant to be a woman of great religious convictions (D130a-9, D140a-7) who "is to be commended for her charity in taking into her home three waifs, so to speak, or orphans from Greece * * *" (D47a-25).

Before the three children involved in this suit left Greece for the home of defendant in America, they were all vaccinated, and she holds their vaccination certificates (D32a-26, D34a-18). These children were not born into the Christian Science faith but defendant holds a copy of affidavit in Greek, from each of the natural mothers, originals of which have been recorded in Athens, by the terms of which each mother consents to have her child reared in the faith of Mrs. Maas, during his stay with her, including the prohibition against the use of medication. Each affidavit was signed by the mother involved, in the presence of two witnesses and of a notary public. The fathers of these chil-

dren are either dead or their whereabouts are unknown. In each instance, the authenticity of the signature of the Notary Public is attested to by the Chairman of the Notary Public Assoc. of the Courts of Appeal at Athens, by the Presiding Justice of the Athens First Instance Court and by the Ministry of Justice. The English translation of the copy of affidavit is certified as being true and exact by the Ministry of Foreign Affairs. The authenticity of the signatures and the competency of the various officials are attested to by the Vice-Consul of the United States stationed in Athens. These affidavits, Nos. 5427, 5428 and 5429 were before the New Jersey Supreme Court before their decision was rendered, and are certified by the Clerk of the New Jersey Supreme Court as part of the transcript of the record from the court below.

In order to obtain admission of the third set of children into the public schools of Mountain Lakes without immunization, as permitted by N.J.S.A. 18:14-64.2, defendant caused her attorneys to send a certified letter to Dr. Harry W. Wenner, Supt. of the plaintiff Board of Education, on September 24, 1957, (D32a) under which defendant, as guardian of her foster children, requested exemption for them from immunization on religious grounds (D34a). In the pretrial order it was stipulated that defendant had complied with the statute in applying for exemption (D53a-15). Plaintiff, however, refused to register these children on the ground that is was operating under a "policy" (D36a-30, A—a) purported to have been adopted on June 17, 1957, which is alleged in paragraph "3" of the complaint (D2a-13), making it mandatory for it to exclude all unimmunized children from school. Acting through its counsel, defendant's application was rejected by the Board, concluding its letter as follows (D36a-11):

> "The Board of Education of the Borough of Mountain Lakes does not see fit to change its policy, and pupils

will be excluded who are not vaccinated and immunized, *regardless of religious beliefs.*"

Defendant sought to register these children in no fewer than 9 schools in the local area, but without success (D120a-8; D25a-9). Not wishing to hamper the development of the children, nor to violate the compulsory education law in this state, the defendant brought these children to the plaintiff's school on the morning of September 30, 1957, and placed them in the third grade, which is the grade for their age level (D113a-39; D115a-26). Finding that no provision had been made for these children, she left and returned with three collapsible stools, which she placed one at the end of each aisle. Thereafter she departed and did not again enter their classroom (D114a-33; D115-21). The fact that defendant had brought the children and collapsible stools to school was alleged in the complaint (D3a-19), and was readily admitted by the defendant in all her affidavits before the court (D26a-9; P5a-11) as well as at the trial itself (D115a-26).

2. *Events After Litigation Commenced But Before Trial*

On October 9, 1957, (D130a), defendant was served with a complaint (D1a), a brief and an Order to Show Cause (D13a) prepared by Elden Mills, Esq., then attorney for the plaintiff and also Speaker of the New Jersey Assembly, why an interlocutory injunction should not be granted, restraining and enjoining her from entering the schools of the plaintiff and leaving her foster children to attend there. This Order to Show Cause, as originally drawn, provided for ad interim restraint, but before being signed by Judge STANTON, this was struck (P1a-12, 22) and the matter was made returnable at Jersey City at 10 o'clock on the morning of October 11, 1957. Applications by defense attorneys for adjournment of a few days in order properly to prepare

an affidavit and brief in opposition, made to the attorney for the plaintiff and to Judge STANTON who issued the Order to Show Cause, were denied. Because of short time to prepare for the return day, no answering brief was prepared and filed, only an answering affidavit.

On the return day of Order to Show Cause argument was had, and relying solely on *Sadlock* v. *Board of Education of Carlstadt*, 137 N. J. L. 85, (1948), the only case cited by plaintiff, which held the requirement for vaccination to be mandatory, the court granted an interlocutory injunction summarily denying defendant's request for a stay. This order was not entered until October 30, 1957 (D14a), or 19 days later. No opinion was ever filed by Judge STANTON, though copies of notices of appeal were served on the court in compliance with R.R. 1:2-8(a).

Defendant petitioner appealed, as of right, to the Appellate Division. While the appeal was pending unheard in the Appellate Division, petitioner herein applied to the New Jersey Supreme Court for certification under R.R. 1:10-1A(a). This application was denied. The appeal was then dismissed in the Appellate Division under R.R. 2:2-3(a) as amended, which required the obtaining of leave to appeal from an interlocutory order.

Some time thereafter, Elden Miils, Esq. was appointed a County Court Judge for Morris County, and Aaron Dines, Esq. was substituted as attorney for plaintiff.

In the meantime, defendant had been served with summons and complaint; defendant had petitioned for and had been appointed guardian *ad litem* of her three foster children and had filed an answer and counterclaim (D4a-28). The counterclaim was in two counts, the first count claiming special and punitive damages for herself (D11a-6) and the second count claiming punitive damages as guardian

ad litem on behalf of the children for their exclusion from school (D11a-34). Defendant requested a jury trial in the assessment of damages (D11a-40). Thereafter, defendant sought to implead the individual members of the Board as third party defendants. Orders permitting the joinder of third party defendants were duly entered and on June 19, 1958, third party complaint against such third party defendants was filed and thereafter served (D15a). Answer was filed within time (D18a-31).

In an effort not to have the children lose the school year beginning September 1958, motion was made by the defendant—third party plaintiff, petitioner herein, returnable September 12, 1958 (D20a-16) to vacate the interlocutory injunction previously entered by Judge STANTON on October 30, 1957 (D14a). This motion was denied and order to that effect was entered on September 22, 1958 (A54a). Opinion was rendered by Judge MINTZ (A48a to A53a).

The matter came on for pretrial on October 10, 1958 (D49a). Trial began on January 14, 1959. On the morning of the trial, before it actually began, it was stipulated between counsel as part of answers by plaintiffs to interrogatories which defendant sought to compel, that neither these children nor the two previous sets of defendant's foster children from Greece who attended the Mountain Lakes public school had caused any irreparable harm or damage by their attendance (D58a-23, D58a-39, D59a-19, D112a-30), other than there was a trespass on the Board's policy and the immunized children were exposed to possible illness (D59a-8).

3. *Events at the Trial*

The trial disclosed that neither two earlier sets of children (D118a-12) nor the three children involved in this

suit had ever been ill for a single day during their collective stay with defendant since January 1956 (D117a-28); and that there had not been a single case of smallpox or diphtheria in Mountain Lakes from 1950 through 1958 (Ex. D-8, D128a). Over the objection of defendant (D79a-5) the Court admitted testimony of Abram Wallach, a purported "expert" who had never been consulted by the Board before it adopted its policy. He showed no special circumstances to exist in Mountain Lakes why the exemption granted by the New Jersey Legislature should be repealed or even temporarily suspended. His cross-examination by the defendant was curtailed by the trial court, when the Court took judicial notice that medical opinion was divided on the efficacy of immunization (D104a, D105a).

At the conclusion of defendant's case, except for consideration of damages, which was to be assessed by a jury if the Court had found that the plaintiff and third party defendants were liable, the Court rendered judgment for the plaintiff, making the injunction final, dismissed the counterclaim of defendant, dismissed the third party complaint against third party defendants and denied the application of defendant to suspend the operation of the injunction, pending the outcome of an appeal (D140a-32).

4. Events Since the Trial

Notice of appeal to the Appellate Division, followed (D143a), a copy of which was sent to Judges MINTZ and STANTON. While the appeal was pending unheard in the Appellate Division, defendant applied to the New Jersey Supreme Court for certification under R.R. 1:10-1A(a). This application was denied. Argument on the appeal before the Appellate Division was had on June 8, 1959, and the Appellate Division unanimously affirmed the decision of the Chancery Division (A6a to A30a).

Notice of appeal as of right to the New Jersey Supreme Court was filed on July 10, 1959 (P27a). On July 21, 1959, defendant was served with notice of motion to dismiss the appeal on the ground that no substantial constitutional question was involved. On September 21, 1959, that Court determined to hold the motion for consideration at the argument of this appeal (A5a).

Thereafter defendant filed her brief on appeal. Instead of filing their answering brief within 30 days thereafter, as required by the Revised Rules of the New Jersey Supreme Court, respondents obtained successive extensions of time from appellant, first on the ground of illness of one of their counsel, and secondly on the ground that they were trying to enlist the help of the New Jersey Attorney General, inasmuch as substantial constitutional questions were involved. Filing of the brief being long delayed, defendant had to apply to the New Jersey Supreme Court to have the matter set down for argument promptly. In response thereto, respondents filed their answering brief on the 84th day.

In the meantime and on December 24, 1959, a press release appeared on the front page of Mountain Lakes News, that an assistant to the Attorney General had been assigned to the *Maas* case before the New Jersey Supreme Court. Since the New Jersey Attorney General's name did not appear on the brief as filed by respondents, inquiry was made of his office by defense counsel, and on January 14, 1960, he admitted that efforts to get him to intervene had been made, but that he had decided not to do so. Nonetheless no retraction by the respondents was ever made in the local press concerning the Attorney General's connection with the case. (See pages 151a-155a of Appendix attached to reply brief.)

At the end of the school year, since defendant had not succeeded in getting the children admitted to school after a two year exclusion and she was leaving for Holland with her husband, she took the children with her to return them to their mothers. Pending final determination by the United States Supreme Court of the constitutional issues involved herein, defendant has not brought these children, nor any other children to her home.

Just before the appeal was set down for argument, respondents again moved to dismiss the appeal, this time on the ground that the matters in issue were moot, since the children were no longer here.

Argument on the appeal was had before the New Jersey Supreme Court and neither motion to dismiss the appeal was granted. Instead, the court affirmed the Appellate Division in all respects, on the merits.

STATEMENT OF CASE

CONSTITUTIONAL QUESTIONS RAISED

State of Proceedings	D E N I A L O F — Religious Freedom & Equal Protection of Laws	Due Process By Local Bd.	Due Process by Judge Stanton	Due Process by Judge Mintz	Passed upon by Court
Trial (Continued)	x	x			Held by Judge Mintz: (Continued) No denial of due process by plaintiff board. (A43a) In conflict between religious freedom and public welfare, public interest must prevail. (A43a - 44a)
Appellate Division:					
Brief on Appeal of Interloc. Injunc.	x	x	x		Appeal dismissed under R.R. 2:2-3(a). No opinion filed.
Brief on Appeal after trial	x	x	x	x	Due process not violated by interlocutory injunc. on 3 (2) days notice. (A12a) No error in considering testimony of expert. (A13a) Judicial notice taken and its substitution not discussed. Defendant not parent or guardian of children.. (A13a) Board properly exercised its discretion by adopting policy. (A14a - 18a) Due process and relig. freedom not violated. (A19a, et seq.)
N.J. Sup. Court - Brief	x		x	x	Affirmed App. Div. (A2a)
At the Argument		x			

STATEMENT OF CASE

CONSTITUTIONAL QUESTIONS RAISED

State of Proceedings	Denial of Religious Freedom & Equal Protection of Laws	Denial of Due Process By Local Bd.	Denial of Due Process by Judge Stanton	Denial of Due Process by Judge Mintz	Passed upon by Court.
Trial Court:					
Affidavit on return of order to show cause	Par. 5 & 6 (P4a)	Par. 4, (P4a) Par. 14, (P7a)	Par. 3, (P3a)	-	Ignored by Judge Stanton. No opinion filed.
Answer & counterclaim	2nd, 3rd and 5th Separate Defense (D6a et seq.)	4th Separate Defense, (D8a)			
Motion to dissolve injunc.	Par. 1(f), (D21a)	Par. 1(g), (D21a)	Par. 3, (D21a)		Held by Judge Mintz: Religious freedom is not absolute, only relative. (A51a) Policy was valid exercise of police power. (A53a) No decision on denial of due process by Judge Stanton.
Supporting Affidavit	Par. 9, (D24a) Par. 10, (D24a) Par. 20, (D27a) Par. 21, (D28a)		Par. 4, (D23a) Par. 7, (D23a) Par. 8, (D24a) Par. 22, (D28a)		
Pretrial Order	Par. 3, et seq. (D51a) Par. 7, et seq. (D55a)	Par. 3(a)(5), Par. 3(b)(c), (D52a)			
Trial	x	x			Held by Judge Mintz: Testimony of expert considered though his cross-examination was cut off. (A36a) Substitute judicial notice used. (A37a) Policy validly adopted. (A39a)

Reasons for Granting the Writ

1. The New Jersey state courts have decided a federal question regarding a grant of religious exemption from the requirement of immunization, not previously decided by this Court.

2. The New Jersey state courts have decided a federal question regarding a grant of religious exemption not in accord with this Court's recognition of religious freedom, safeguards for due process and equal protection under the law.

3. The New Jersey courts have decided a federal question regarding due process, not in accord with this Court's recognition of due process.

I

The state courts of New Jersey have decided a federal question regarding a grant of religious exemption against immunization, never heretofore decided by this Court.

A. A Substantial Federal Question is Presented

Never before has this Court been called upon to determine whether a state law granting exemption from immunization and vaccination on religious grounds must be honored at the local level where it is administered. Indeed, before the instant suit was brought, not even a state court had been called upon to make such a determination. See cases cited under 93 A. L. R. 1417.

The case of *Jacobson* v. *Maas*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, decided in 1905, and relied upon by the several courts below, is no guide-post here. In the first place, the compulsory vaccination regulation in the *Jacobson* case

contained no grant of exemption on religious grounds as does the instant case. Secondly, smallpox was already prevalent in Cambridge, whereas there has not been a single case of smallpox or diphtheria in Mountain Lakes for the 9 years for which records were available. Said the Court in the *Jacobson* case:

> "We now decide only that the statute covers the present case * * *.
>
> "Upon the principle of self-defense, of *paramount necessity*, a community has the right to protect itself against an *epidemic* of disease which threaten the safety of its members. It is to be observed that when the regulation in question was adopted, smallpox, according to recitals in the regulation * * * was prevalent to some extent in the City * * * and the disease was increasing." 197 U. S. 27, 49 L. Ed. 650.

This case decided only that the police power of a state could be invoked to protect life, liberty, health or property within its limits, during an emergency.

But this police power in the *Jacobson* case was not an unlimited power. It had to be *justified by the necessities of the case*. Said the Court at 197 U. S. 28:

> "*Smallpox being prevalent and increasing at Cambridge* the Court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state to protect the people at large was arbitrary, and not *justified by the necessities of the case.*"

This case was followed by *Zucht* v. *King* in 1922, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194, which involved a compulsory vaccination ordinance. The question there involved was the denial of petitioner's right to the equal protection of the

laws. Because the case was improperly brought to the court, on a writ of error rather than on petition for a writ of certiorari, the writ of error was dismissed.

This Court is now called upon to decide between freedom of religion, to grant which, in consonance with Federal and New Jersey constitutions, was the declared policy of a state legislature, and an arbitrary and capricious exercise of the police power by a local Board of Education, which nullified such grant without cause and "regardless of religious beliefs."

In this balancing process, we submit that the First Amendment, in the circumstances here present, is paramount. For example, we find this Court saying in *Cantwell* v. *Connecticut* (1940) 310 U. S. 296, 303-304, 60 S. Ct. 900, 903, 84 L. Ed. 1213, that the religious freedom "Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." As against this, the Court has also held that "Freedom of press, freedom of speech, freedom of religion, are in a preferred position." *Murdock* v. *Penn* (1943) 319 U. S. 105, 115, 63 S. Ct. 870, 87 L. Ed. 1292, 1299.

These preferred freedoms are not vague guarantees like the due process clause of the Fourteenth Amendment, pursuant to which state action is presumed valid.

> "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which the Legislature may have a 'rational basis' for adopting. But freedom of speech, and of press, of assembly, and of worship may not be infringed on such slender grounds." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, 639 (1943).

Implicit in the opinions of the trial court, and the Appellate Division is the nebulous claim that the general public will benefit from the actions of the local board. But such a broad, limitless claim, because of its very breath, never justifies the imposition of restrictions on religious liberty. In failing to recognize this, many state courts have erred. Not infrequently, the personal freedom protected by the First Amendment requires the sacrifice of some community interest. For example, First Amendment freedoms have been protected against the recognized public interest to prevent annoyance to householders;[1] to furnish income to the municipality;[2] to protect against inciting a breach of the peace;[3] to limit the use of public parks;[4] to inculcate respect for the American flag;[5] to insure judicial impartiality[6] to protect against atheistic and subversive Russian influences;[7] and to regulate religious meetings on public streets.[8]

"As this Court has said in *First Unitarian Church* v. *Los Angeles*, 357 U. S. 545, 548; 2 L. Ed. 2nd 1484, 1487; 78 S. Ct. 1350:

"'As we stated in West Va. Board of Educ. v. Barnette, 319 U. S. 624, 642, 87 L. Ed. 1628, 1639, 63 St. Ct. 1178,

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[1] *Martin* v. *Struthers*, 319 U. S. 141 (1943).

[2] *Murdock* v. *Penn.*, 319 U. S. 105 (1943).

[3] *Cantwell* v. *Conn.*, 310 U. S. 296 (1940).

[4] *Fowler* v. *R. I.* 345 U. S. 67 (1953).

[5] *West Va. State Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943).

[6] *Bridges* v. *California*, 314 U. S. 252 (1941).

[7] *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 97 L. ed. 120, 73 S. Ct. 143 (1952).

[8] *Kunz* v. *New York*, 340 U. S. 290, 95 L. ed. 280 (1951).

147 ALR 674, 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or forced citizens to confess by word or act their faith therein.' "

B. To Deny Religious Freedom "Clear and Present Danger" Must be Imminent

From an analysis of United States Supreme Court cases it would seem that freedom of religion may not be infringed upon, except under three clearly defined exceptions, viz:

(1) Where the religious practices are immoral, as in *Reynolds* v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244 (1878). There the United States Supreme Court refused to countenance polygamy as a religious practice, for it considered polygamy immoral, and an offense against society.

(2) Where the religious practice interferes with the religious freedom or constitutional liberties of others. This is not the case of petitioner herein. No religious group has advocated immunization against diphtheria on grounds of religious freedom. Therefore, those who are opposed to immunization on religious grounds are not interfering with the religious freedom of others. Nor have they any desire to convert other people to their belief, but only of maintaining their own free exercise of religion. Moreover, if immunization has any efficacy at all, those who are immunized run no risks of acquiring diphtheria. In *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (flag salute case) one of the chief reasons for reversing its earlier decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586, 84 L. Ed. 1375, 60 S. Ct. 1010 (1940) was the absence of interference with other people's beliefs.

(3) Where clear and present danger to a substantial interest of the state is present. What, then, is a "clear and present danger"? First, it must be a danger of some "extremely serious" substantive evil. *Bridges* v. *State of California* (1940) 314 U. S. 252, 263; 62 S. Ct. 190; 86 L. Ed. 192, 203. Second, the danger must be "clear," that is, there must be proof that the evil will almost inevitably result from the particular exercise of freedom, *Whitney* v. *People of State of California* (1927) 274 U. S. 357, 376; 47 S. Ct. 641; 71 L. Ed. 1095, 1106. Third, the danger must be "present," that is, the "degree of imminence extremely high," *Bridges* v. *State of California* (*supra*), 314 U. S. at p. 263, 62 S. Ct. at p. 194; 86 L. Ed. at p. 192; or "immediate and urgent," *Board of Education* v. *Barnette* (*supra*), 319 U. S. at p. 633; 63 S. Ct. at p. 1183, 87 L. Ed. at p. 1635; it "must not be remote or even probable; it must immediately imperil," *Craig* v. *Harney* (1947), 331 U. S. 367, 376; 67 S. Ct. 1249; 91 L. Ed. 1546, 1552.

We submit that the plaintiff-third party defendants respondents have not brought themselves within the "clear and present danger" exception. Indeed, at the conclusion of the trial, the trial court admitted that "the possibility of resultant diseases" had the children attended school, was "remote" (D139a-37) (A43a). Commenting on this point, the Appellate Division stated (A29a):

> "Whether her doing so (bringing the children to school) would have resulted in a spread of diphtheria is not a pertinent consideration. The possibility, however remote, was always present."

While a "clear and present danger" concept was not conceived until *Schenck* v. *U. S.* (*supra*), 249 U. S. 47, 52, we see the germ of that idea in *Jacobson* v. *Mass.* when that Court spoke of the "necessities of the case," 197 U. S. 28, 49 L. Ed. 650.

In conclusion, the Court said, at 197 U. S. 38; 49 L. Ed. 655:

> "Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that *the police power of a state, whether exercised* directly by the legislature, or *by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts* to prevent wrong and oppression."

We submit to this Court that where the state has clearly provided for an exemption on religious grounds, the purpose of which was to "give a board of education which has exercised its right to exclude certain unimmunized pupils from the public school, the *further discretionary right not to exclude any pupil*," for a local board of education to outright repeal that exemption without limitation as to time or circumstances, without "*paramount necessity*," "*without clear and present danger*" was "*not justified by the necessities of the case*" and was arbitrary, capricious and oppressive.

II

The New Jersey state courts have decided a federal question regarding the grant of religious exemption, not in accord with this Court's recognition of religious freedom, safeguards for due process and equal protection under the law.

A. Religious Freedom Was Not Recognized

Comes now the defendant-petitioner and avers that N.J.S.A. 18:14-64.2 as amended by the L. 1952, c. 153, p. 514, in the light of its Statement of Purposes, gave her an unquestionable right as the guardian of her three foster children, and in their behalf, to request and receive an exemption from the requirement of immunization. This right was denied to her first by the Mountain Lakes Board of Education and then by the New Jersey state courts.

Religious freedom was set at nought, in the New Jersey courts, when they relied on *Sadlock* v. *Board of Educ. of Carlstadt* (1948), 137 N. J. L. 85, a case decided under a statute which made no provision for exemption. An analysis of points of differences between the *Sadlock* and instant case is included in the margin hereof.[9]

No reference to this analysis was made in the opinion of the Appellate Division, which the New Jersey Supreme Court affirmed, *per curiam*.

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[9] The *Sadlock* Case Distinguished

Sadlock Case	*Instant Case*
a) Decided in 1938 *before* the 1952 amendment to N.J.S. 18:14-52 was passed, which granted exemption because of religious beliefs.	a) Decided 1957-1959, *after* 1952 amendment to N.J.S. 18:14-64.2 was passed, granting exemption because of religious beliefs.

(Continued on following page)

No recognition was given by the New Jersey state courts either at the trial or appellate level to the recognition of

(Continued from preceding page)

Sadlock Case	*Instant Case*
b) Resolution of the Board was adopted in conformity with N.J.S. 18:14-52 as it then existed.	b) Policy of the Board was adopted in contravention of N.J.S. 18:14-64.2 as amended.
c) Prosecutors attacked the constitutionality of N.J.S. 18:14-52.	c) Defendant concedes the constitutionality of 18:14-64.2, but attacks the constitutionality of the Board's "policy" in derogation thereof.
d) Abeyance of school exclusion order granted, pending final hearing.	d) Abeyance of school exclusion order denied at three different times during the proceedings (D14a-35; D48a-14; D142a-31).
e) Following *Jacobson* v. *Mass.*, 197 U. S. 11, no testimony by expert was permitted to detract from legislative decree.	e) Full direct examination of expert to nullify legislative purpose was permitted, but cross-examination of such expert was cut short by the Court.
f) Determined that testimony of expert was for legislature to consider, not for the court.	f) Direct testimony of expert fully considered by the Court, though it had curtailed cross-examination.
g) Judicial notice taken that vaccination is commonly believed to be a safe way to prevent smallpox.	g) Judicial notice taken, there are great differences of opinion among medical men as to the efficacy of vaccination and immunization.
h) Held to be a matter of "legislative determination" whether or not to grant a religious exemption.	h) Judicially determined that to repeal a state exemption "regardless of religious belief," without any basis in fact, was proper.
i) Decision at trial level was never reviewed by an appellate tribunal.	i) Arbitrary and capricious repeal of religious exemption by local school board affirmed by all the state courts.

religious beliefs which the Statement of Purposes sought to insure, thereby frustrating the will of the New Jersey legislature.

Solely on the difference in language between the discretionary exemption permitted by N.J.S.A. 18:14-64.2 and the mandatory exemption given by N.J.S.A. 18:14-64.10, passed 5 years later, the state courts felt justified in completely ignoring the legislative intent in the former law "to uphold religious freedom by virtue of the guarantees afforded by the Constitutions of the United States and of this State."

In its opinion on the motion to vacate the injunction (A50a) and in its opinion after trial (A40a), the trial court considered statutory construction of "may" and "shall" unrelated and detached from the purpose of the legislature to grant a religious exemption.

The statement of purposes was an important part of N.J.S.A. 18:14-52 and N.J.S.A. 18:14-64.2 and could not thus lightly be pushed aside by semantics as to "may" and "shall." As seen in 50 Am. Jur. 283:

> "*The purpose* for which a statute is enacted is of primary importance in the interpretation thereof. Indeed a statute is often regarded as speaking as plainly by means of the purpose which underlies it as in any other manner."

Also, as held by the Court of Errors and Appeals, the predecessor of the present New Jersey Supreme Court, in *Leitner v. Citizens Casualty Co.*, 135 N. J. L. 608, 611 (E. & A. 1947):

> "* * * The statute should have a rational construction consistent with its *manifest purpose* and not one which will substantially defeat its object."

To the same effect, see:

3 Sutherland Statutory Construction 3rd ed. 79;
Wilson v. *U. S.* 135 F. 2nd 1005 (C. C. A. 3rd Cir. 1943);
City of Bayonne v. *No. Jersey Dist. Water Supply Co.* (App. Div. 1954), 30 N. J. Super. 409;
The State. Kennelly v. *The Mayor & Alderman of Jersey City, et al.* (on certiorari, Sup. Ct. *en banc*, Nov. 1894), 57 N. J. L. 293;
McDonald v. *Hudson County Freeholders*, 98 N. J. L. 386, 393 (Sup. Ct. *en banc*, 1923).

The Appellate Division however in (A17a) examining the statement of purposes, though it stated the meaning of the statute to be unambiguous. By emphasizing certain words it was able to determine that a local board of education in the exercise of its discretion as to whether to grant exemption or not, in effect, had the power to completely repeal such exemption. Thereafter, no further discretion need be exercised. It was just as though the Legislature had given religious objectors to compulsory medication a grant with one hand and a repeal with the other.

B. Due Process Was Denied

"And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall* (1958) 357 U. S. 513, 520; 2 L. ed. 2nd 1460, 1469; 78 S. Ct. 1332.

Viewed in this frame of reference, an examination of the minutes of meetings of the Board since June 8, 1953 (see D145a *et seq.*) leads inescapably to the conclusion that in denying exemption "regardless of religious belief", the Board acted without erecting any procedural safeguards for the preservation of religious rights and due process, provided for in the First and Fourteenth Amendments.

Read thus consecutively, in their entirety, the written deliberations of the Board evidenced by their minutes disclose a complete lack of any reason why the state law should not be followed and an appalling and callous disregard of those statutes which granted religious exemption from the requirements of immunization and vaccination. During the four years covered by the minutes, at no point and at no time did the Board ever feel called upon even to consider or discuss the law or the exemption contained therein. Nor did the Board consider any basis in fact or circumstances for not following it.

It is this absence of any basis in fact for repeal of the exemption which is arbitrary, capricious and a denial of due process. This Court has repeatedly held, under the Selective Service Acts of 1940 and 1948 (now called Universal Military Training & Service Act) that where local draft boards had classified registrants and denied them classification as conscientious objectors or as ministers they must have a basis for such denial. See: *Estep* v. *U. S.*, 327 U. S. 114; 66 S. Ct. 423, 90 L. ed. 567 (1945) and *Dickinson* v. *U. S.*, 346 U. S. 389 (1953).

And in *Denbo* v. *Township of Moorestown*, 23 N. J. 476; (1957) certified by the New Jersey Supreme Court on its own motion, we find that plaintiff was denied a permit to construct a gas station under local ordinance. Said Chief Justice VANDERBILT at p. 484:

> "The total irrelevancy of the basis upon which the township has denied the permit indicated a misapprehension of the basic power delineated by the ordinance and an arbitrary use of power as an end in itself rather than a means to the end expressed in the ordinance."

Thus we find that in adopting the "policy" on June 17, 1957, the respondent board of education was legislating

without following established legislative procedure, or even its own procedure for adopting policies. On September 24, 1956 (Ex. D-5, D147a-7) motions were made and carried which provided that:

> "All policies shall be reviewed annually at the first regular board meeting of the year after the organization meeting." "New policies or revisions to existing policies will be adopted by the Board only after they have been received in writing and considered in at least one prior regular or special meeting of the Board."

The policy of June 17, 1957, upon which the plaintiff relies, was either an old policy or a new policy. If it was an old policy, it should have been reviewed "at the first regular board meeting of the year after the organization meeting." An examination of the minutes of the first regular meeting after the organization meeting, viz., February 25, 1957 (Ex. D-7, D147a-20) shows no review of any existing policy. In fact, there were no policies. Until September 24, 1956, there were no rules for the adoption of policies. Not until June 17, 1957, did it formally adopt its first policy.

The June 17, 1957 policy must therefore be considered a *new* policy. In such event, it should have been received in writing and considered in at least one prior regular or special meeting of the Board prior to adoption. This was not done. This short cut was a denial of due process. In fact, after the policy was unanimously adopted on June 17, 1957, a hearing was accorded to Mr. Rader of the Christian Science Church at a special meeting on July 1, 1957 (Ex. P. 10, D148a-35); further proof of illegal action. The policy having already been passed at an earlier meeting, the issue was not reopened after Mr. Radar spoke. How expect the Board publicly to reverse itself and pro-

claim that it had been guilty of precipitous, ill-advised and ill-considered action?

The Trial Court held (A42a), and the Appellate Division adopted, the reasoning (A19a), that, based on *Krieger* v. *City of Jersey City*, 27 N. J. 535 (1958), where the statute is silent the delegated power may be exercised by resolution. However, overlooked by these courts in that same case at p. 542 was the holding that *decisions which antedated the statute* upon which suit was brought have no validity. This threw into the discard the Sadlock, the Jacobson and the *Zucht* cases upon which the state courts relied to deny exemption.

C. Defendant Was Denied Equal Protection of the Laws

1. By the Mountain Lakes Board of Education

Other communities in the State of New Jersey were not as authoritarian as was the plaintiff board: 74 known communities (D37a, D38a) have granted exemptions on religious grounds to Christian Scientists, Seventh Day Adventists, members of the Union Assembly of the Church of God and other religious sects through the state. This has created a condition where the protection of the laws is not applied equally, but depends upon the accident of geography. In justifying its rejection of the petitioner's claim for exemption, the Mountain Lakes Board of Education claimed that it treated all parents alike, whether natural or foster parents, without discrimination, and denied to each claimant the religious exemption to which he was entitled. As the Court said in *Murdock* v. *Penn.*, 319 U. S. 105, 115; 87 L. ed. 1292, 1299 (1943):

> "The fact that the ordinance (policy) is 'non-discriminatory' is immaterial."

2. *By the Courts*

The Appellate Division has held, and the New Jersey Supreme Court has affirmed, that since defendant-petitioner was a foster mother, she had no status to raise the constitutional question of denial of religious freedom, citing *Jones* v. *Opelika*, 316 U. S. 584, 62 S. Ct. 1231, 86 L. ed. 1691, 141 A.L.R. 514 (1942) (A14a). Overlooked by the courts was the fact that this decision was subsequently reversed at the following term, 319 U. S. 103; 87 L. ed. 1290, 63 S. Ct. 1943.

In the light of this reversal, and in the light of N.J.S.A. 18:14-64.2, it would seem that a foster parent *has* an equal constitutional right to claim a religious exemption for her wards. The statute reads:

> "A Board of Education may exempt the pupil from the provisions of this section if the *parent or guardian* of said pupil objects thereto * * *"

Moreover, petitioner holds the written consents of the natural mothers who had full knowledge of the fact that defendant-petitioner was a Christian Scientist. In the circumstances, who is answerable for the religious training of the children, the defendant or the New Jersey courts? As the New Jersey Court of Errors and Appeals has said:

> "Intervention in matters of religion is a perilous adventure upon which the judiciary should be loathe to embark." Donahue v. Donahue, 142 N. J. Eq. 701, 703 (1948).

Furthermore, it should be borne in mind that the basis of denying defendant-petitioner's claim for exemption by the Mountain Lakes Board of Education was not that she was a foster parent, rather than a natural parent, but the fact that they had adopted a policy which they did not see fit to change "regardless of religious belief".

III

The New Jersey courts have decided a federal question regarding due process, not in accord with this Court's recognition of due process.

A. The Trial Court Denied Due Process When It Issued an Interolcutory Injunction on Short Notice.

As seen above, this suit for an interlocutory and permanent injunction was begun in September 1957, by complaint, order to show cause and accompanying brief (D1a, D13a), on two days notice in an atmosphere of great urgency, necessity and haste. Request by defendant-petitioner of the Court and of plaintiff's counsel for a few days adjournment for the preparation of an answering brief was summarily denied, though no special circumstances were shown to require abrogation of R.R. 4:67-3.

By abridging the notice from 5 to a scant 2 days, defendant individually, and her three foster children for whom she appears as guardian *ad litem*, were immeasurably prejudiced in the preparation of their defense. On the return day of the order to show cause, no brief on behalf of the defendant was presented, only an answering affidavit which put in issue paragraphs "10" and "11" of the complaint. Nonetheless, Judge STANTON granted the interlocutory injunction (D14a) without ever filing a written opinion. Once the injunction was granted, the urgency ceased and it took plaintiff 19 days to prepare the interlocutory order of one page! (D14a)

This initial denial of due process has dogged the defendant throughout the proceedings which followed. On the first appeal, motion by respondents to dismiss in the Appellate Division on technical grounds was granted on February 10, 1958, and the wrongful issuance of the injunction continued. On September 12, 1958, motion by defendant

petitioner to vacate the injunction (D21a) was argued in Morris County before Judge MINTZ, County Court Judge, temporarily assigned to the Superior Court. He was placed in the regrettable and embarrassing position of having to review:

1. The interlocutory injunction issued by a Superior Court Judge who had summarily denied the application to stay its operation;

2. The action of his colleague, Judge ELDEN MILLS, who, as attorney for plaintiffs, had applied for the injunction.

How should he decide? —The motion to vacate the injunction was denied.

At the trial, faced with the fact that no cataclysm had resulted by reason of the children's exclusion from school, the court sustained the arbitrary and illegal action of the Board.

As appears herein, the plaintiff sought an injunction. No one could be expected to interview the defendant, extract and sift the required information from her, compose, dictate and correct an affidavit; and, over and above that, research the law, and prepare a brief, all within a scant two days. Had the time been extended at least to the 5 days provided by R.R. 4:67-3, a better showing would have been made, and Judge STANTON might have been more circumspect.

Moreover, Judge STANTON could then have complied with R.R. 4:67-5. Thus, that first wrongful judicial act was pyramided on the wrongful acts of the Board, to bar three healthy children from school for all time, beginning with September 11, 1957. Failure to give the minimal time required by the rules, was a denial of due process.

The Appellate Division met this argument by asserting that "*three*" days notice (A12a) was ample. We suspect

that this was the Court's way of admitting that two days notice was inadequate, so it took the difference between the date of issuance and the date of return of Order to Show Cause, as the period of notice, as though defendant were served instantaneously. Affidavit of service shows she had only two, not three days notice (D150a).

The Appellate Division further says that "counsel was afforded extensive oral argument" (A12a) and that the "trial court considered the situation with which the board was faced as presenting exceptional circumstances" (A12a). There was no reporter present; no record of proceedings. Present counsel for respondents were not yet in the case. No opinion was filed by Judge STATON. On what information dehors the record, does the Appellate Division base its conclusions?

To support its position the Appellate Division cites two cases:

1. *Market St. Ry. Co.* v. *R. R. Comm. of Cal.*, 324 U. S. 548, 652; 65 S Ct. 770, 89 L. Ed. 1171 (1945) (A—a) where it was held that due process would acquire a perverse function if it could be used where substantial justice had been done. In that case, we find at 324 U. S. 559 that "*no request for time* to obtain such evidence *was denied*." There had been hearings held on May 10, July 15, and September 15, 1943. The Railway Co. introduced 33 exhibits; certain voluminous annual and monthly reports; comparative balance sheets and witnesses whose testimony comprised three volumes of transcript (150 P. 2nd 196). Was that defendant's situation, when she had a scant two days and she asked for the full five days that the rules permitted her?

When the United States Government cited the *Market St. Railway* case in *Simmons* v. *U. S.*, 348 U. S. 398 (1955) to support its contention that due process was being "trivialized by formal objection," the United States Supreme Court rejected the argument and said at p. 405:

"Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation."

2. The case of *Boots 'N Saddle* v. *Newark Municipal Bd. A.B.C.*, 44 N. J. Super. 38 (App. Div. 1957) (A12a) involved a liquor tavern whose license had not been renewed because its record from 1953 to July 1956 showed that the police had been summoned to the premises no fewer than 60 times for complaints, among others, that included lewdness, immoral activities, solicitation for prostitution on the premises, etc. There is no relevancy between that case and granting an injunction on two days notice.

Having been denied due process by the Chancery Division, having had her three foster children barred from school beginning with September 11, 1957, the Appellate Division asserts that the granting of the interlocutory injunction and therefore, the denial of due process, is now moot (A13a). We disagree. The defendant here is seeking damages for herself and three foster children, as against the Board and third party defendants and the right to bring in other foster children (orphans) from abroad.

A cause is not moot, unless the ultimate relief sought by the petitioner has been obtained, leaving nothing further for the Court to grant. *Taylor* v. *McElroy*, 360 U. S. 709, 3 L. ed. 2nd 1528, 79 S. Ct. 1428 (1939). If plaintiff was not entitled to an injunction, defendant is entitled to a trial on the issue of damages alleged to have been suffered as a consequence of such injunction. *Three Rivers Oil Co.* v. *Laurence* (La. Sup. Ct. 1923), 153 La. 224, 95 So. 652.

The wrongful acts of the respondents which gave rise to the damages sought by petitioner, represent not an isolated act but a continuing and unabated activity, creating an actual controversy with adverse interests, on which the judgment of the court can operate. It should not be necessary for defendant to be involved in successive lawsuits, with every foster child she seeks to enter in the plaintiff's schools. *Wallina* v. *Helmerick & Payne, Inc.*, 323 U. S. 37, 89 L. ed. 29 (1944).

B. The Trial Court Denied Due Process at the Trial by Consideration of Expert Testimony and Substitution of Judicial Notice

It is obvious that plaintiff recognized that their "policy" could not stand up at the trial. In desperation, therefore, reinforcements were brought in, in the person of an alleged expert, Abram Wallach, with the high sounding rank of epidemiologist.

This expert had not been consulted by the Board prior to adoption of its ill-advised "policy". He gave no testimony regarding special circumstances in Mountain Lakes which created a "clear and present danger" to require that the exemption in the statute should be temporarily inoperative. Under the *Jacobson* and *Sadlock* cases *(supra)*, his testimony to bolster repeal of the exemption was clearly inadmissible.

All the experts had had their opportunity to testify at the legislative level before the exemption was written into the statute. Respondents could no more bring in an expert to nullify the legislative grant of exemption, than Jacobson or Sadlock could bring an expert to nullify compulsory vaccination.

As his cross-examination proceeded, the trial court brought petitioner's cross-examination of Wallach to a

halt by taking judicial notice that there was a difference of opinion among medical men as to the efficacy of vaccination and immunization (D104a, D105a). No request had been made for judicial notice, by either side; no prior notice had been given to either side that such judicial notice would be taken. After taking such judicial notice, the expert's testimony became academic and ceased to have any probative value.

Nevertheless, when the opinion of the trial court came to be written, the court committed two errors:

a) It resurrected the Wallach testimony (A36a) which had been interred in the taking of judicial notice;

b) Without notice to counsel, it substituted a new judicial notice for the one that had been taken and agreed upon in open court.

The substituted judicial notice reads (A37a):

> "And it would likewise appear that judicial notice may be taken that immunization to diphtheria is a safe and desirable means to prevent the spread of diphtheria; and that this belief is supported by high medical authority; perhaps challenged by others."

The trial court, in the circumstance, denied petitioner due process:

1) When it cut off cross-examination of the expert and embodied his testimony in its opinion;

2) When it took one form of judicial notice in open court, and without notice, substituted another form of judicial notice in its opinion.

This is the Appellate Division's comment on these errors (A13a) which the New Jersey Supreme Court affirmed:

"Although defendant strongly attacks the weight that was given his testimony, she offered no countervailing proofs to refute what he said. There was no error here."

On the curtailment of cross examination by the taking of judicial notice; on the judicial notice taken, on the substitution of a new judicial notice, without notice that the substitution would be made, the Appellate Division was silent.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient gravity and importance to require this Court to issue a writ of certiorari to the New Jersey Supreme Court, to review its decision made herein.

FRANKEL & FRANKEL,
Attorneys for Petitioner.

ESTHER SIBUM FRANKEL,
Of Counsel with Petitioner.

Appendix A

Decision of the New Jersey Supreme Court (February 22, 1960)

Supreme Court of New Jersey
No. A81 September Term 1959

THE BOARD OF EDUCATION OF MOUNTAIN LAKES, etc.,

Plaintiff-Respondent,

vs.

PAULINE MAAS, individually and as Guardian ad Litem, etc.,

Defendant-Appellant.

PAULINE MAAS, individually and as Guardian ad Litem, etc.,

Third Party Plaintiff-Appellant,

vs.

ALTON C. DICKIESON, et al.,

Third Party Defendants-Respondents.

Argued February 9, 1960. Decided February 22, 1960.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinion is reported at 56 *N. J. Super.* 245.

Mrs. Esther Strum Frankel argued the cause for the appellant (Messrs. Frankel & Frankel, attorneys).

Appendix A

Mr. Aaron Dines argued the cause for the respondents (Mr. Louis Winer, attorney).

PER CURIAM

Assuming the appellant's standing, we nonetheless affirm the judgment of the Appellate Division on the merits for the reasons expressed in the opinion of Judge Goldmann in that court.

A true copy

JOHN H. GILDEA,
Clerk.

Appendix B

Mandate on Affirmance in the New Jersey Supreme Court (February 22, 1960)

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 2931
Civil Action

THE BOARD OF EDUCATION OF MOUNTAIN LAKES, etc.,
Plaintiff-Respondent,

vs.

PAULINE MAAS, individually and as Guardian ad Litem, etc.,
Defendant-Appellant.

PAULINE MAAS, individually and as Guardian ad Litem, etc.,
Third Party Plaintiff-Appellant,

vs.

ALTON C. DICKIESON, et al.,
Third Party Defendants-Respondents.

This cause having been duly argued before this Court by Mrs. Esther Strum Frankel, counsel for the appellant and Mr. Aaron Dines, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed

with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the twenty-second day of February, 1960.

Filed—February 22, 1960

JOHN H. GILDEA, Clerk.

JOHN H. GILDEA,

Clerk of the Supreme Court

Appendix C

Order of the New Jersey Supreme Court on Motion to Dismiss Appeal (September 21, 1959)

SUPREME COURT OF NEW JERSEY

BOARD OF EDUCATION OF MOUNTAIN LAKES,

Plaintiff-Respondent,

vs.

PAULINE MAAS,

Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss the appeal is held for consideration at the argument.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-first day of September 1959.

JOHN H. GILDEA
Clerk

FILED
Sep. 21, 1959

JOHN H. GILDEA
Clerk

Appendix D

Opinion of the Appellate Division (June 22, 1959)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-301-58.

THE BOARD OF EDUCATION OF MOUNTAIN LAKES, *etc.*,

plaintiff-respondent,

vs.

PAULINE MAAS,

defendant-appellant.

PAULINE MAAS, individually and as guardian *ad litem*, *etc.*,

third-party plaintiff-appellant,

vs.

ALTON C. DICKIESON, *et al.*,

third-party defendants-respondents.

Argued June 8, 1959—Decided June 22, 1959.

Before Judges Goldmann, Freund and Haneman.

MRS. ESTHER STRUM FRANKEL argued the cause for appellant (MESSRS. FRANKEL and FRANKEL, attorneys).

MR. AARON DINES argued the cause for respondent Board of Education of Mountain Lakes.

Appendix D

Mr. Louis Winer argued the cause for the third-party defendants-respondents.

The opinion of the court was delivered by

Goldmann, S.J.A.D.

Defendant Pauline Maas (who is also third-party plaintiff) appeals from a final judgment and injunction entered in the Chancery Division in favor of plaintiff board of education and the individual third-party defendants, as well as from prior orders granting plaintiff an interlocutory injunction against her and denying her application to dissolve that injunction. The judgment was the culmination of litigation embracing several claims which arose out of defendant's attempts to gain attendance in the Mountain Lakes public schools of three children, temporarily in the United States from the Kingdom of Greece, and who had not been properly immunized against diphtheria.

I

Mrs. Maas resides in Mountain Lakes and has been a Christian Scientist since December 1933. She is conscientiously opposed to vaccination, immunization, or other forms of medication. In September 1957 she sponsored the admission to the United States of three children from Greece for a 12-month stay here. That stay has since been extended. The children are not Christian Scientists but apparently of the Greek Orthodox persuasion; we are told they come from broken homes where the father has either died or deserted. Prior to leaving Greece they were vaccinated against smallpox in August 1957. They are the third set of three children whom defendant has sponsored. From 1953 to date plaintiff board of education has officially expressed itself on the subject of compulsory vaccination against smallpox and immunization to diphtheria. It has annually, by motion or resolution, consistently taken

the view that before a child can be admitted to the public schools of Mountain Lakes there must be proof of vaccination and immunization, and this in the best interests of the public health, safety and welfare. For example, on May 13, 1957 the board on motion reaffirmed its existing policy that all children must be vaccinated against smallpox and present evidence of either a negative Shick test or a course of inoculations with diphtheria toxoid. Defendant appeared at the board meeting of June 3 to object to this policy as a Christian Scientist. On June 17, 1957 the board unanimously adopted the following formal motion:

> "The Board of Education of Mountain Lakes shall require vaccination against smallpox and immunization to diphtheria as prerequisites for attendance at school.
>
> Any pupil failing to comply with such requirements shall be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive the immunizing treatment, or a certificate signed by a physician or by the Board of Health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria; *provided*, that in either or any such instance the certification and the test employed shall have the approval of the school medical inspector."

A representative group of Christian Scientists appeared at the next board meeting, held July 1, 1957, to present its views, claiming that the existing policy infringed their religious principles and pointing out that there had been no smallpox cases in the borough since 1950. The chairman explained that the board had sought and received both legal and medical advice, and had carefully considered the issue. He invited any board member to move that the policy question be reopened, but no one did so.

Appendix D

Although parents had from time to time sought exemption from immunization on the basis of religious principles, the board adhered to its practice of not granting anyone exemption on that ground.

On September 24, 1957 defendant, as well as her attorney, wrote the superintendent of schools, noting that the children had been vaccinated against smallpox and objecting to immunization to diphtheria as contrary to defendant's religious beliefs and the tenets of the Christian Science Church, and requesting exemption from the board's policy under *N.J.S.A.* 18:14-64.2, discussed below. Plaintiff, through its attorney, at once responded, enclosing a copy of the resolution setting out the board's policy, pointing out that exemption under *N.J.S.A.* 18:14-64.2 was discretionary with the board, and stating that the board "does not see fit to change its policy and pupils will be excluded who are not vaccinated and immunized regardless of their religious beliefs." Defendant was further advised that upon compliance with the board rule the three children would be admitted.

On September 30, 1957 defendant, without authority, brought the unimmunized children to the third grade of the local school and told the teacher in charge she was going to leave them there, although they were unregistered. Advised that there were no desks and chairs available, she delivered three stools to the classroom, and left the children there for the day. The press and newspaper photographers were present, apparently at defendant's instigation. She continued to bring the children to school daily until plaintiff resorted to the courts.

On October 8, 1957 plaintiff obtained an *ex parte* order to show cause, returnable three days later, why an interlocutory injunction should not be issued restraining defendant from entering and leaving the three children in the local schools. Defendant filed a detailed affidavit in opposition. Although she alleged she was unable to present a brief be-

cause of the short date, her affidavit fully set out her factual and legal assertions. On October 11, 1957 the Chancery Division judge, after hearing oral argument, directed the entry of an interlocutory injunction. Defendant at once discontinued her practice of bringing the children to the school.

Thereafter defendant filed an answer with separate defenses alleging contravention of the religious freedom guaranteed her under the First and Fourteenth Amendments to the United States Constitution and under Article I, paragraphs 3 and 5 of the New Jersey Constitution of 1947; that the policy adopted by plaintiff board was arbitrary and capricious, and in effect repealed the provisions of *N.J.S.A.* 18:14-64.2; and that plaintiff's refusal to register the children amounted to a denial of the equal protection of the laws. By way of counterclaim she alleged arbitrary and capricious interference with her constitutional right of religious freedom and demanded ordinary and punitive damages.

Defendant's next step was to file a notice of appeal from the Chancery Division restraining order, purportedly as of right. Plaintiff moved to dismiss on the ground that this was an attempt to appeal an interlocutory order, within the ambit of *R.R.* 2:2-3(a). While this was pending defendant sought direct certification to the Supreme Court. The application was denied. The Appellate Division subsequently dismissed her attempted appeal.

Defendant then filed a third-party complaint against the individual members of the Mountain Lake Board of Education and the superintendent of schools, alleging wilful and malicious interference with her religious beliefs and seeking ordinary and punitive damages. She also claimed damages as guardian *ad litem* of the three children. After the third-party defendants had answered, Mrs. Maas moved with supporting affidavits to dissolve the interlocutory judgment entered almost a year before. The motion was denied.

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The pretrial order is unusually comprehensive and carefully developed. At the hearing which followed plaintiff board introduced minutes of meetings reflecting its official action through the years with respect to immunization and vaccination. It also produced a public health consultant qualified in the fields of epidemiology, bacteriology and biostatistics, who testified that a policy of compulsory immunization to diphtheria promotes the public health and is an effective barrier to the disease. He also stated that the presence of one unimmunized child in a group of immunized children may be the cause of one or more illnesses or deaths from the particular disease because total immunization had not yet been achieved among those who had been treated. Further, it might make the immunized children carriers of the disease. It was his firm opinion that a local board of education policy requiring immunization to diphtheria as a prerequisite to attendance of all children in the schools was a measure in the interest of public health, safety and welfare. Other witnesses for plaintiff were the superintendent of schools, who detailed the history of defendant's attempts to get the children into the school system, and the teacher with whom she had left the children.

Defendant testified in her own behalf, declaring her adherence to Christian Science doctrine and her refusal to have the children immunized because of her religious beliefs. Although invited by the court to present whatever testimony she had on the question of liability under the counterclaim and third-party complaint, defendant rested her case, claiming she had no testimony but insisting that liability existed as a matter of law.

Plaintiff's motion for judgment of injunction on the complaint, and of no cause of action on the counterclaim, was granted. The third-party defendants' motion for judgment of involuntary dismissal was likewise granted. Defendant's motion for an order suspending the operation of the

injunction pending the outcome of an intended appeal was denied.

II

We consider, preliminarily, defendant's claim that she was denied due process by the granting of the interlocutory judgment on three days' notice. She alleges that the short return day made impossible the preparation of a brief, thereby prejudicing her cause.

The Chancery Division judge could have issued a temporary restraining *ex parte* order under *R.R.* 4:67-2. Instead, he entered an order to show cause without restraint. The more acceptable practice would have been to bring the matter on by motion. *R.R.* 4:67-3 provides that unless a temporary restraint or special directions for services are sought, "or other exceptional circumstances appear," an interlocutory injunction shall be applied for on motion without securing an order to show cause. Briefs are required. The trial court must have considered the situation with which the board of education was faced as presenting exceptional circumstances, and so adopted the course indicated.

We perceive no prejudice visited upon defendant, or any denial of procedural due process. Her lengthy counter-affidavit fully set out her contentions, both factual and legal, and her counsel was afforded extensive oral argument. It has been said that due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties. *Market Street Ry. Co.* v. *Railroad Comm'n of California*, 324 *U. S.* 548, 562, 65 *S. Ct.* 770, 89 *L. Ed.* 1171 (1945). As Judge CLAPP observed in *Boots 'N Saddle* v. *Newark Municipal Bd., A.B.C.*, 44 *N. J. Super.* 38, 41 (*App. Div.* 1957), "The magnificent concept of due process would seem to have acquired a most perverse func-

tion if it could be made use of in order to reverse a case where substantial justice has plainly been rendered." Defendant had ample opportunity to be heard, and her contentions were fully aired. Her argument reduces itself to a procedural nicety, and we find it without merit.

Additionally, the matter of the interlocutory injunction is now moot in light of the granting of the final injunction here under appeal.

III

We would also dispose of defendant's contention that the testimony of the public health consultant should not have been admitted or considered by the court. He was preeminently qualified in his field, and the court properly permitted him to testify. Contrary to defendant's claim, he fully established that vaccination and immunization are effective health measures, reasonably related to and necessary for the public health, safety and welfare. Although defendant strongly attacks the weight that was given his testimony, she offered no countervailing proofs to refute what he said. There was no error here.

IV

Defendant's main argument is that plaintiff board acted contrary to the statute, *N.J.S.A.* 18:14-64.2, and restricted religious freedom guaranteed by the Federal and State Constitutions.

Before dealing with the outreaches of this argument we will consider defendant's status to raise the constitutional question.

Defendant is neither the parent nor the legal guardian of the three children whom she brought from Greece. They were given into her temporary custody by their mothers. At the time she sought their admittance to the Mountain Lakes public schools she occupied a position no stronger

than that of foster mother *pro tem*—for the period of one year during which the immigration authorities permitted the children to be with her. It is stipulated that the children did not come of Christian Science parents; as we have said, it would appear they had been brought up in the Greek Orthodox Church. They were vaccinated against smallpox before coming to this country, and this apparently without objection on religious grounds. The objection now made to immunization is solely defendant's; it is not asserted on behalf of the children, and could not be in the circumstances.

Basically, the constitutionality of a statute, ordinance or regulation is open to attack only by a person whose rights are adversely affected. The burden of proof is upon the individual who claims himself harmed to show how, as to him, the statute is unconstitutional. *Jones* v. *Opelika*, 316 *U. S.* 584, 62 *S. Ct.* 1231, 86 *L. Ed.* 1691, 141 *A.L.R.* 514 (1942). No one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others; such a one "is not the champion of any rights except his own." 11 *Am. Jur., Constitutional Law*, § 111, *pp.* 752-753 (1937), and see notes 13 and 14. Defendant may not use the children to champion her own rights and beliefs.

Insofar as defendant seeks to assert her own right to religious freedom, she has no standing. The vaccination and immunization requirement does not apply to her. She has no personal responsibility for the children's religious upbringing other than in the religion in which they were raised.

V

Defendant argues that the policy adopted by plaintiff board was not within the legislative grant of discretion, *N.J.S.A.* 18:14-64.2, but actually repealed or nullified it. The statute reads:

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"The Board of Education of any school district may require immunization to diphtheria as a prerequisite to attendance at school, and it may at its discretion require or waive proof of immunity, except as hereinafter provided.

Any pupil failing to comply with such a requirement may be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive the immunizing treatment, or a certificate signed by a physician or by the Board of Health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria; *provided,* that in either or any such instance the certification and the test employed shall have the approval of the school medical inspector.

A Board of Education may exempt the pupil from the provisions of this section if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles."

In effect, she claims that the last paragraph of the statute compelled plaintiff board to exempt the children from the requirement that they be immunized to diphtheria before they could attend school where, as here, she had objected thereto in writing because it interfered with the free exercise of religious principles. We pass the statutory language which calls for the *parent* or *guardian* of the pupil to make such objection—defendant being merely a foster mother—and deal directly with the question of whether the statute is mandatory or permissive. We find nothing mandatory in the provision; it clearly leaves exemption to the discretion of the local board of education.

The use of the word "may" in a statute like *N.J.S.A.*

18:14-64.2 is not new. For example, the smallpox vaccination statute, *R.S.* 18:14-52, provided that a local board of education "may" exclude from school any teacher or pupil who had not been successfully vaccinated or revaccinated unless he presented a certificate signed by a medical inspector appointed by the board that he was an unfit subject for vaccination. This law was amended by *L.* 1952, *c.* 152, adding language that the board "may" exempt a teacher or pupil from the provisions of the section if the teacher, or the parent or guardian of the pupil, made written objection on the ground that the proposed vaccination interfered with the free exercise of religious principles.

In 1939 the Legislature bestowed similar authority on a local board of education with respect to immunization to diphtheria. *N.J.S.A.* 18:14-64.2 (*L.* 1939, *c.* 299). That statute provided that the board "may" require immunization to diphtheria as a prerequisite to school attendance and "may at its discretion" require or waive proof of immunity. Any pupil failing to comply with the requirement "may" be excluded from school unless he presents a certificate signed by a physician stating that he is unfit to receive immunization, or a certificate signed by a physician or the board of health or the municipal health officer to the effect that the pupil is known to be immune to diphtheria. This statute was also amended in 1952 (*c.* 153) to read as quoted above, by adding a paragraph relating to exemption where written objection to immunization is made on religious grounds.

The language of *N.J.S.A.* 18:14-64.2, like that of *N.J.S.A.* 18:14-52, clearly bespeaks discretion. "May" in the last paragraph is not to be tortured into "shall." If we construe "may" as "shall" in the final paragraph of *N.J.S.A.* 18:14-64.2, then we would, with equal logic, have so to interpret it in the first paragraph, thereby compelling a board to require immunization, leaving no room whatsoever for discretion. The same illogical result would at-

tend *N.J.S.A.* 18:14-52, were defendant's reading to be accepted.

The language of the immunization statute is unambiguous, and so there is no need to refer to the legislative statement of purpose which accompanied the 1952 amendment (*c.* 153). However, we will look to that statement, not to strengthen our conclusion as to the obvious meaning of the law, but to show that defendant's contention is without any merit whatsoever. That statement reads:

> "The purpose of this bill is to give a board of education which has exercised its right to exclude certain unimmunized pupils from the public schools, *the further discretionary right* not to exclude any pupil from the public schools when the pupil, parent or guardian is an adherent of a well recognized religion and when the parent or guardian exercises his religious beliefs in objecting in writing to immunization to diphtheria of his child or ward. This bill will be consonant with the tendency of the Legislature and administrative bodies to uphold religious freedom by virtue of the guarantees afforded by the United States and of this State." (Italics ours)

Our Legislature has shown its ability to require exemption, when legislative judgment so dictates, in the identical area of statutory enactment. Thus, in *N.J.S.A.* 18:14-64.10 (*L.* 1957, *c.* 133), which provides that a local board of education "may" require all pupils to be immunized against poliomeylitis as a prerequisite to school attendance, and "may" at its discretion require or waive proof of immunity, the Legislature directed that the board "shall" exempt a pupil from the provisions of the act where the parent or guardian makes written objection to immunization on religious grounds. The Legislature there manifested its ability to distinguish "may" from "shall."

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It is not our function to interpret the statute here under consideration so that it will read directly contrary to the legislative intent. Any request for statutory modification should be addressed to the Legislature, the appropriate body for such revision, and not to the courts. See *Sadlock* v. *Board of Education of Carlstadt*, 137 *N. J. L.* 85, 89 (*Sup. Ct.* 1948), quoting from *Jacobson* v. *Massachusetts*, 197 *U. S.* 11, 25, *S. Ct.* 358, 49 *L. Ed.* 643 (1905).

Plaintiff's compulsory vaccination and immunization policy was entirely within the ambit of delegated legislative authority, promulgated by *N.J.S.A.* 18:14-52 and 18:14-64.2. The authority of the Legislature to empower a local agency with such discretion was settled in *Jacobson* and received judicial recognition by our courts in *Sadlock*.

VI

Defendant claims that the board's action was arbitrary and capricious. Not so. Its actions with reference to compulsory health measures have been completely consistent. Its minutes disclose that the subject was considered at length on previous occasions. It consulted legal and medical authority before acting, and has maintained a uniform policy since 1953. The minutes show that no exemption was granted on religious grounds to some and not to others; all parties similarly situated were always treated alike. We are entirely convinced that the board, in its approach to pubile health measures, comprehensively considered and consistently adhered to a complete prevention method in dealing with school children committed to its care.

It is also contended that the board did not follow the legislative procedure of adopting and continuing its vaccination and immunization policy, thereby denying due process. Further, it is claimed that the board did not even follow its own established procedure, a September 1956 motion of the board providing that all policies be reviewed

annually at the first regular board meeting of the year after the organization meeting, and that new policies or revisions to existing policies to be adopted by the board only after they had been received in writing and considered in at least one prior regular or special meeting.

The enabling statute, *N.J.S.A.* 18:14-64.2, does not provide a procedure by which a local board of education must act. Where a statute is silent on the method by which the actions of a municipal body are to be manifested, the delegated power may be exercised by resolution. *Cf. Krieger* v. *Jersey City*, 27 *N. J.* 535, 542 (1958); *Eggers* v. *Kenny*, 15 *N. J.* 107, 123 (1954). The evidence shows that ample consideration was given to the health policy at a number of meetings. The compulsory vaccination and immunization program was often stated and reaffirmed by the board in the years preceding this action. The board restated its position on May 13, 1957 and again on June 17 of that year. Indeed, on February 17, 1958, at the organization meeting of the board, it was agreed that all existing policies be reviewed at the next meeting, and on February 24 the board's policies, rules and regulations were presented for annual review, and no changes, revisions or corrections were made. We find that the board has substantially complied with its own procedure for adopting policies. In any event, its self-imposed by-law calling for annual review of all policies after the organization meeting was simply directory and not jurisdictional. A technical non-compliance with a directory provision will not vitiate the very plainly expressed policy of the board adopted pursuant to statutory authority.

VII

The core question on this appeal is defendant's contention that the compulsory vaccination and immunization regulation adopted by the board deprived her of due process and religious freedom, within the contemplation of the

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United States Constitution, Amendments I or XIV, and the *New Jersey Constitution* (1947), *Art.* I, *pars.* 3 and 5.

A requirement that a child must be vaccinated and immunized before it can attend the local public schools violates neither due process nor (as defendant tangentially suggests) the equal protection clause of the Constitution. The rationale for this rule is rooted in traditional concepts recognizing the authority of a local board, acting under a legislative grant of power, to promote the community health, safety and welfare. The fact that there may be differences of opinion as to the necessity or efficacy of vaccination or immunization does not deprive the State of the power to enact legislation requiring compulsory vaccination or immunization, or the local board from acting pursuant to such a power. *Jacobson* v. *Massachusetts*, above; *Zucht* v. *King*, 260 *U. S.* 174, 43 *S. Ct.* 24, 67 *L. Ed.* 194 (1922); *Viemeister* v. *White*, 179 *N. Y.* 235, 72 *N. E.* 97, 70 *L. R. A.* 796 (*Ct. App.* 1904).

Jacobson involved the validity, under the United States Constitution, of a Massachusetts statute giving a local board of health authority to require vaccination of all residents of the municipality if, in its opinion, it was necessary for the public health or safety. Acting pursuant to that statute the Cambridge board of health adopted a compulsory vaccination regulation. The Supreme Court held that the statute was a proper exercise of the legislative prerogative and that it did not deprive the individual of his constitutional guarantees of personal and religious liberty. Speaking for the court, Justice Harlan said that on settled principles the police power of a state must be held to embrace such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. That there was medical opinion which attached little or no value to vaccination as a means of preventing the spread of smallpox was of no moment; it was for the Legislature, and not the court, to determine the

most effective method of protecting the public against disease. Addressing himself to defendant's claim that the statute invaded his constitutional liberties, Justice Harlan said:

> "* * * But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' * * *" (197 U. S., at page 26)

Zucht v. *King* dealt with city ordinances requiring a certificate of vaccination as a prerequisite to attendance at a public school or other place of education. Plaintiff sought an injunction against the enforcement of the ordinances and a writ of *mandamus* compelling her admission to the public schools, claiming that the ordinances deprived her of her liberty without due process of law. Speaking for the

court, Justice Brandeis said it was settled that "a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. * * * A long line of decisions by this Court has also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing." The ordinances were held not to confer arbitrary power, "but only that broad discretion required for the protection of the public health." (269 *U. S.*, at *pages* 176-177)

The question of compulsory vaccination was first considered in this State by our former Supreme Court in *Sallock* v. *Board of Education*, above, 137 *N. J. L.* 85. Prosecutors in *certiorari* there challenged a certain resolution of the Carlstadt Board of Education making vaccination of school children in the local public schools compulsory. The resolution was adopted pursuant to *R.S.* 18:14-52, which has heretofore been discussed. The contention was that both the resolutions and the statute were unconstitutional in that they violated the guarantees of the Federal and State Constitutions pertaining to personal and religious liberties. The court held that they did not, stating:

> "* * * The principle is too well established to require citation that the so-called constitutional liberties are not absolute, but are relative only. They must be considered in the light of the general public welfare. To hold otherwise would be to place the individual above the law. * * *" (137 *N. J. L.*, at *page* 91)

See, also, the comprehensive annotation in 93 *A. L. R.* 1413, and particularly *pp.* 1430 *et seq.* (1934); Brown, "Police Power—Legislation for Health and Personal Safety," 42 *Harv. L. Rev.* 866 (1929); *cf. Dowell* v. *Tulsa*, 273

P. 2d 859, 43 *A. L. R. 2d* 445 (*Okla. Sup. Ct.* 1954), *certiorari* denied 348 *U. S.* 912, 75 *S. Ct.* 292, 99 *L. Ed.* 715 (1955) (ordinance calling for fluoridation of city water supply held valid).

Defendant points out that 18 states have no compulsory vaccination laws and that many New Jersey municipalities do not require vaccination or immunization. This in no way affects the issue before us; the Legislature has chosen to act within the broad field of state police power, and the municipality has adopted a policy pursuant to legislative authority granted. Their right to do so may not be challenged at this late date.

Defendant also argues that compulsory vaccination and immunization is not called for in Mountain Lakes because there has been no case of smallpox or diphtheria for almost a decade. The absence of an existing emergency does not warrant a denial to the regulative agency of the exercise of preventive means. A local board of education need not await an epidemic, or even a single sickness or death, before it decides upon action to protect the public. To hold otherwise would be to destroy prevention as a means of combatting the spread of disease. A similar argument was made in the *Sadlock* case, and negatively resolved. See *Stull* v. *Reber*, 215 *Pa.* 156, 64 *A.* 419 (*Sup. Ct.* 1906), where the fact that there had been no smallpox in the borough for 40 years did not prevent the enforcement of the compulsory vaccination regulation; *State* v. *Drew*, 89 *N. H.* 54, 192 *A.* 629 (Sup. Ct. 1937).

VIII

Nor did the local regulation abridge religious freedom within the meaning of the Federal and State Constitutions. In considering the compulsory vaccination of school children under *R.S.* 18:14-52 adopted by the local board of education in the *Sadlock* case, the court rejected the precise religious issue here raised by defendant, when it said:

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"So, too, with respect to the guaranty of religious liberty, the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare." (137 *N. J. L.*, at *page* 91).

In *McBride* v. *McCorkle*, 44 *N. J. Super.* 468 (*App. Div.* 1957), we had occasion to say:

"The First Amendment to the United States Constitution guarantees the free exercise of religion, and coupled with the Fourteenth Amendment it also projects citizens from state action prohibiting such exercise. *Cantwell* v. *State of Connecticut*, 310 *U. S.* 296, 60 *S. Ct.* 900, 84 *L. Ed.* 1213 (1940). And our own State Constitution, Article I, paragraph 3, provides that 'No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; * * *.' The Supreme Court in the *Cantwell* case drew a distinction between freedom to believe and freedom to exercise one's belief, pointing out that the former is absolute, the latter not. 310 *U. S.* at *pages* 303-304, 60 *S. Ct.*, at *page* 903. Freedom to practice one's religion must be considered in the light of the general public welfare. *Sadlock* v. *Carlstadt Board of Education*, 137 *N. J. L.* 85, 91 (*Sup Ct.* 1948); *Reynolds* v. *United State*, 98 *U. S.* 145, 25 *L. Ed.* 244 (1878). * * * Examination of decisions upholding curtailment of the free exercise of religion shows that they involved situations where the court found the restriction reasonably necessary to protect some paramount societal interest. *Prince* v. *Commonwealth of Massachusetts*, 321 *U. S.* 158 (64 *S. Ct.* 438, 88 *L. Ed.* 645 (1944); *Hamilton* v. *Regents of the University of California*, 293 *U. S.* 245, 55 *S. Ct.* 197, 79 *L. Ed.* 343 (1934); *Cantwell* v. *State of*

Connecticut, above; and see Antieau, 'The Limitation of Religious Liberty,' 18 *Fordham L. Rev.* 221 (1949)." (at *pages* 478-479)

Prince v. *Massachusetts*, cited by us in *McBride*, involved the extent to which the free exercise by members of the Jehovah's Witnesses sect of their spiritual compulsion to sell and distribute on city streets tracts containing an exposition of their faith could constitutionally be impaired by legislative prohibition thereof when carried on by children under specified ages. The problem of conflict between religious faith and regulatory law was essentially the same as that projected by defendant in the present appeal. The United States Supreme Court sustained the law, stating:

"To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, * * *.

* * * It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce* v. *Society of Sisters*, *supra* [268 *U. S.* 510]. And it is in recognition of this that these deci-

sions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 *U. S.* 145; *Davis* v. *Beason*, 133 *U. S.* 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People* v. *Pierson*, 176 *N. Y.* 201, 68 *N. E.* 243. The catalogue need not be enlightened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." (321 *U. S.*, at *pages* 156-167)

The language of *Prince* is particularly applicable here, even though defendant does not stand in the position of actual parent or guardian of the three children in question.

Of interest is the legislative attempt in 1954 to amend *R.S.* 18:14-57 requiring that every pupil attending a public school be examined medically to determine whether any physical defect existed, and that a permanent record be kept from year to year of his growth and development. *Assembly Bill* 265 attempted to add a proviso that if the

parent or guardian of a pupil made written objection to such an examination "upon the ground that the proposed examination interferes with the free exercise of his religious principles," the pupil was to be exempted from the examination. There was a saving clause qualifying the right of exemption where the pupil had been exposed to a communicable disease or his presence in the classroom was certified as detrimental to the health or cleanliness of the other pupils. The measure was adopted by the Legislature at the request of Christian Scientists on the ground that the existing statute compelled medical examination in violation of their religious rights. The bill was vetoed by the Governor, who quoted at length from the *Prince* case in concluding that the general public health and welfare involved in the existing requirement for physical examination of all school children transcended consequential conflict with religious convictions on the part of those who sought the right of exemption for their children under the bill, See *Veto Messages of Governor Robert B. Meyner* (1954), *page* 107 *et seq.* As to the Legislature's subsequent treatment of *R.S.* 18:14-57, see *L.* 1955, *c.* 25 (*N.J.S.A.* 18:14-57).

There is some question whether the tenets and teachings of Christian Science actually compel a person like defendant to resist plaintiff board's policy requiring vaccination and immunization for children who want to attend the local schools. We note the following in *The First Church of Christ Scientist and Miscellany* (1917 *ed.*), by Mary Baker Eddy, founder of the Christian Science Church:

> "I have expressed my opinion publicly as to the precautions against the spread of so-called infectious and contagious diseases in the following words:
>
> 'Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results. What-

ever changes come to this century or to any epoch, we may safely submit to the providence of God, to common justice, to the maintenance of individual rights, and to governmental usages. This statement should be so interpreted as to apply, on the basis of Christian Science, to the reporting of a contagious case to the proper authorities when the law so requires. When Jesus was questioned concerning obedience to human law, he replied: "Render to Caesar the things that are Caesar's," 'even while you render "to God the things that are God's."'

I believe in obeying the laws of the land. I practise and teach this obedience, since justice is the moral signification of law. Injustice denotes the absence of law. * * *" (at *pages* 219-220)

and

"Then as to the laws—the health laws of the States on the question of infectious and contagious diseases. How does Christian Science stand as to them?

I say, 'Render to Caeser the things that are Caesar's.' We cannot force perfection on the world. Were vaccination of any avail, I should tremble for mankind; but, knowing it is not, and that the fear of catching smallpox is more dangerous than any material infection, I say: Where vaccination is complusory, let your children be vaccinated, and see that your mind is in such a state that by your prayers vaccination will do the children no harm. So long as Christian Scientists obey the laws, I do not suppose their mental reservations will be thought to matter much. But every thought tells, and Christian Science will overthrow false knowledge in the end." (at *pages* 344-345)

These references to the teachings and writings of Mary Baker Eddy are not intended to be in any way dispositive of the religious freedom issue posed by defendant. We

have resolved that question earlier in this section of the opinion on more fundamental, meritorious grounds.

IX

Defendant has also made the argument that plaintiff's policy on vaccination and immunization would result in a violation of *N.J.S.A.* 18:14-1 relating to the admission and attendance at school of children between the ages of 5 and 20; *N.J.S.A.* 18:14-2, which makes exclusion from school of a child between the ages of 4 and 20 on account of race, creed, color, national origin or ancestry a misdemeanor; and *N.J.S.A.* 18:14-14 requiring every parent, guardian or other person having custody and control of a child between the ages of 7 and 16 to have such child regularly attend the local public schools. With but few exceptions, it has uniformly been held that health measures prescribed by local authorities as a condition of school attendance do not conflict with statutory provisions conferring on children of proper age the privilege of attending school, nor with compulsory education laws. See Annotation, 93 *A. L. R.* 1413, at *pages* 1434-1441.

X

Defendant advances the further point that plaintiff was not entitled to injunctive relief because it had not shown irreparable injury. She admits that if the interlocutory injunction had been vacated she would have resumed bringing the unimmunized children to school in defiance of the board's health regulation. Whether her doing so would have resulted in a spread of diphtheria is not a pertinent consideration. The possibility, however remote, was always present.

We cannot accept defendant's position as sound. Were we to adopt it a board of education would have authority to require vaccination and immunization as preventive

health measures, in the public interest, but would be without power to secure the aid of a court in their enforcement.

The injunctive process of the Chancery Division was necessary in aid of the policy of preventing disease, adopted by the local board in the public interest. Prevention, as an effective means, is defeated if court action requires positive epidemic signs as a condition precedent to relief. Defendant's acts were clearly in direct conflict with prevention, with which immunization is so intimately related. The restraint which was sought and obtained preserved the *status quo* and prevented impairment of the subject matter of the litigation. The public interest was seriously affected.

The pleadings and affidavits made out a clear case for invoking the aid of the court in arresting defendant's behavior pending final determination, and so the interlocutory restraint properly issued. What was true in the initial phases of the case remained true at final determination: the final injunction was clearly justified.

XI

Finally, defendant complains that the Chancery Division should not have dismissed her counterclaim and third-party complaint. In seeking ordinary and punitive damages under the counterclaim, defendant's theory was that the board had acted in a wilful and malicious manner. This was also the basis for her third-party complaint against the individual board members and superintendent of schools.

There was not a scintilla of evidence to support these claims. What the board and the board members did was to adopt a policy clearly within the ambit of discretion provided by *N.J.S.A.* 18:14-64.2, as we have already held. They acted after due deliberation, consultation and discussion. There was no fraud, malice or discrimination in what they did, and their action was manifestly within the scope of their delegated authority. The record is barren of anything that would indicate the contrary.

The judgment will be affirmed in all respects.

Appendix E

Mandate on Affirmance in the Appellate Division (June 22, 1959)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appeal Docket No. A-301-58 Civil Action

THE BOARD OF EDUCATION OF MOUNTAIN LAKES, *etc.*,
Plaintiff-Respondent,

vs.

PAULINE MAAS,
Defendant-Appellant.

PAULINE MAAS, individually and as guardian *ad litem*, *etc.*,
Third Party Plaintiff-Appellant,

vs.

ALTON C. DICKIESON, *et al.*,
Third Party Defendants-Respondents.

This cause having been duly argued before this Court by Esther Strum Frankel, counsel for the appellant and Aaron Dines and Louis Winer, counsels for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Chancery Division, is affirmed with costs; and it is further ordered that this mandate shall

issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Chancery Division, to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 22nd day of June, 1959.

I. GRANT SCOTT
Clerk of the Superior Court

Appendix F

Opinion of Judge Mintz After Trial (January 30, 1959)

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY—CHANCERY DIVISION
MORRISTOWN, NEW JERSEY
JANUARY 22, 1959
DOCKET NO. C-297-57

THE BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES,

Plaintiff,

vs.

PAULINE MAAS,

Defendant,

and

PAULINE MAAS, individually and as Guardian ad Litem, etc.,

Third-Party Plaintiff,

vs.

ALTON C. DICKIESON, et al.,

Third-Party Defendants.

Before

Honorable NELSON K. MINTZ,
J. S. C. (T.A.)

Appearances:

AARON DINES, attorney for the plaintiff.

FRANKEL & FRANKEL, by Esther Strum Frankel, attorney for Third-Party Plaintiff.

LOUIS WINER, attorney for Third-Party Defendant.

WILLIAM W. POWERS,
Certified Shorthand Reporter.

Appendix F

MINTZ, J.S.C. (T.A.)

The plaintiff, Board of Education of the Borough of Mountain Lakes, seeks to restrain and enjoin defendant, Pauline Maas, from violating its regulation precluding the admission of unimmunized children to the public school. The defendant counterclaims and has filed a third-party complaint, individually and as guardian ad litem for the three children, against the individual members of the Board, asserting damages by reason of the Board's requirement of compulsory immunization to diphtheria as a prerequisite for the attendance of school children at the Borough public schools. She seeks compensatory and punitive damages on the counterclaim and third-party complaint.

Defendant is a devout Christian Scientist. She is the foster mother of Emanuel Augostoupoulos, Anastasia Maratou, and Dimitrios Pagistakis, the three children whom she sought to enroll in the Borough public school. The children are of Greek nationality. Defendant, Mrs. Maas, sponsored their entry into the United States on a temporary basis. They arrived here in September 1957. The parties stipulated that the three children were vaccinated for smallpox before they left Greece.

In accordance with the provisions of N.J.S.A. 18:14-64.2, defendant on September 24, 1957 made written application to the Borough for exemption of her three foster children from the requirement of immunization to diphtheria on grounds of interference with the free exercise of her religious beliefs. She sought the admission of such unimmunized foster children to the school.

The minutes of the School Board indicate that the defendant also appeared at the Board meeting on June 3, 1957 and urged that the Board waive the requirement of immunization on the grounds of interference with religious principles. On June 17, 1957 formal action was taken and the minutes of the Board meeting state that "A motion

was made by Mr. Kingsley, duly seconded, that the Board adopt the following health policy in connection with the vaccination and diphtheria immunization and that said policy be included and be part of the Board's policy rules and regulations:

> "The Board of Education of Mountain Lakes shall require vaccination against smallpox and immunization to diphtheria as prerequisites for attendance at school.
>
> 'Any pupil failing to comply with such requirements shall be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive the immunizing treatment for a certificate signed by a physician or by the Board of Health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria; provided, that in either or any such instance the certification and the test employed shall have the approval of the school medical inspector.'
>
> The motion was unanimously approved."

It further appears that this action of the Board was a reaffirmation of its position taken on several prior occasions. The subject of immunization was first presented to the Board on June 8, 1953. No formal action was then taken, but on July 27, 1953 a motion was unanimously voted, and I quote:

> "Henceforth, all kindergarten pupils and new students enrolling in the elementary schools be required to show written certification of satisfactory immunization against diphtheria and against smallpox before admission to the class."

The minutes of the Board meeting of December 14, 1953 disclose that five students refused vaccination and the

Board suggested that the Superintendent of Schools follow the Board ruling concerning vaccination.

On October 25, 1954 the Board unanimously adopted a motion substantially in the same language as the July 27, 1953 motion. On March 12, 1956 the Board minutes disclose that exemption from immunization was requested on religious principles by other parents and the Board agreed that the policy fixed in October 1954 requiring immunization of all children be continued.

There were additional instances prior to September 1957 when the subject of immunization was considered by the Board. At all times the Board adhered to the practice of not granting anyone exemption to immunization on account of religious principles.

Mrs. Maas was clearly informed by the school authorities that the three children would be denied admission to the school in the absence of immunization. Upon compliance with such requirement they would be admitted. Yet, on September 30, 1957, with full knowledge of this fact, she brought the unimmunized children to the school and told the teacher in charge that she was going to leave them there, although they were unregistered. When advised there were no desks and chairs for them she delivered three stools to the classroom for the use of the three children. She continued daily to bring and leave the children at the school until temporarily enjoined by this Court on October 11, 1957.

The testimony of Abraham Wallach, a public health consultant, clearly disclosed that a policy of compulsory immunization to diphtheria promotes the public health and is an effective barrier to such disease. He further testified that the presence of one unimmunized child in a close group of immunized children may make one of such children a carrier of the disease and poses the threat of illness or death to a member of that group. There are differences of opinion as to the necessity for compulsory immuniza-

tion. Such differences do not deprive the State of the power to enact legislation requiring compulsory immunization. The State may delegate to a municipality the right to determine when and under what circumstances health regulations such as immunization shall be operative. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Zucht* v. *King*, 260 U. S. 174. Many states and municipalities have no such requirement. On the other hand, a great number do. In *Sadlock* v. *Board of Education of Carlstadt*, 137 N.J.L. 85 (1948), the Court took judicial notice that vaccination is commonly believed to be a safe and valuable means of preventing the spread of certain diseases, particularly smallpox and that this belief is supported by high medical authority. And it would likewise appear that judicial notice may be taken that immunization to diphtheria is a safe and desirable means to prevent the spread of diphtheria, and that this belief is supported by high medical authority; perhaps challenged by others. In any event, the testimony produced indicates the widespread belief supported by competent authority that a program for school children of compulsory immunization to diphtheria promotes public health.

The question of desirability or efficacy is a matter of legislative and not judicial determination. The Legislature of our State has determined the desirability by the enactment of N.J.S.A. 18:14.64.2 which reads as follows:

> "The Board of Education of any school district may require immunization to diphtheria as a prerequisite to attendance at school, and it may at its discretion require or waive proof of immunity, except as hereinafter provided.
>
> "Any pupil failing to comply with such a requirement may be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive the immunizing treat-

ment, or a certificate signed by a physician or by the Board of Health or the health officer of the municipality in which the pupil resides to the effect that the pupil is known by evidence of an appropriate test to be immune to diphtheria; provided, that in either or any such instance the certification and the test employed shall have the approval of the school medical inspector.

"A Board of Education may exempt the pupil from the provisions of this section if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles."

Defendant contends that under this statute the Board of Education cannot adopt a policy of compulsory immunization regardless of religious scruples, and upon the showing admittedly made in this case that the proposed immunization interferes with the free exercise of the religious principles of the defendant, the Board of Education was required to grant the three children exemption from immunity to diphtheria as a prerequisite to attendance at school. It is further urged that since there was not a single case of smallpox or diphtheria reported in the municipality from 1950, the Board's exclusion of the three unimmunized children from the school system was arbitrary, capricious, and an abuse of discretion, assuming it possessed such discretionary power.

The Statute, N.J.S.A. 18:14-52, under consideration in *Sadlock*, reads as follows:

"A Board of Education may exclude from school any teacher or pupil who has not been successfully vaccinated or re-vaccinated unless the teacher or pupil shall present a certificate signed by the medical inspec-

"tor appointed by the Board of Education that the teacher or pupil is an unfit subject for vaccination."

The resolution of the Borough was adopted in accordance with that statute. The Court in *Sadlock* concluded that the parent statute did not make it a prerequisite that there be an epidemic or threatened epidemic of smallpox in order to justify adoption of the resolution as a reasonable exercise of the police power.

The argument was made that the Borough of Carlstadt resolution restricted religious freedom. The Court held, and I quote:

"The principle is too well established to require citation that the so-called constitutional liberties are not absolute, but are relative only. They must be considered in the light of the general public welfare. To hold otherwise would be to place the individual above the law. The Court of Errors and Appeals in *Valentine* v. *Englewood et al.*, 76 N. J. L. 509; 71 Atl. Rep. 344, opinion by Mr. Justice Swayze, affirmed this principle, stating:

'In *Jacobson* v. *Massachusetts*, 197 U. S. 11, the Compulsory Vaccination Act of Massachusetts was sustained, although it interfered with a man's personal liberty. These cases are but illustrations of the extent to which the highest tribunal has gone in vindication of the principle that the individual must yield somewhat of his personal rights to society in return for the benefits of society which he enjoys.' "

The principle of law enunciated in *Sadlock* finds further expression in the decisions involving fluoridation of a city's water supply. *Dowell* v. *Tulsa*, 273 Pac. 2nd 859 (Okla. Sup. Ct. 1954), certiorari denied 348 U. S. 912; *Baer* v. *City of Bend*, 292 Pac. 2nd 134 (Ore. Sup. Ct. 1956). Defendant contends that since the 1952 amendment to N.J.S.A. 18:14-

52, the *Sadlock* decision no longer applies and that the fluoridation cases are not in point. I disagree. The only effect of the 1952 amendment was to add religious scruples as a discretionary basis for exemption from vaccination for smallpox. That statute now provides that a board of education "may" exclude a pupil not vaccinated, and "may" exempt the pupil from the proposed vaccination on religious grounds. Significantly, the word *may* is employed. The salient distinction between the use of the term *may* and *shall* in a statute is pointed up by a comparison of the statute involved in this case and the immunization-to-poliomyelitis statute adopted in 1957, N.J.S.A. 18:14-64.10. The "diphtheria" statute, N.J.S.A. 18:14-64.2, adopted in 1952 provides that the board of education "may exempt the pupil" from the provisions of that statute if the proposed immunization interferes with the religious principles of the parent or guardian. N.J.S.A. 18:14-64.10 provides that the board of education of any school district "may require all pupils" to receive immunization treatment against poliomyelitis as a prerequisite to attendance at school, and that the board "shall" exempt the pupil from the requirement of immunization on a showing that immunization is contrary to the religious principles of the parent or guardian. The distinction between *may* and *shall* is clearly drawn in the poliomyelitis statute. In the immunization-to-diphtheria statute the pupil "may" be exempt from the requirement of immunization on religious grounds, whereas in the poliomyelitis statute the pupil "shall" be exempt. It may be urged that the polio immunization is a newly-tried experiment. The Legislature believed that a mandatory exemption should be accorded to those objecting thereto on religious grounds; yet immunization to diphtheria is widely accepted and has met the test of time and experience. In the interest of public health the Legislature concluded that the exemption from immunization to diphtheria on religious principles shall not be mandatory but rather, discretionary.

That may or may not be the explanation for the difference. Be that as it may, the distinction plainly exists. The legislative intent may be further ascertained by reference to the statement of purpose attached to the 1952 amendment when it was introduced in the Legislature. That statement reads: "The purpose of this bill is to give a board of education which has exercised its right to exclude certain unimmunized pupils from the public schools, the further discretionary right *not* to exclude any pupil from the public schools when the pupil, parent or guardian of the pupil is an adherent of a well-recognized religion, and when the parent or guardian exercises his religious beliefs in objecting in writing to immunization to diphtheria of his child or ward. This bill will be consonant with the tendency of the Legislature and administrative bodies to uphold religious freedom by virtue of the guarantees afforded by the Constitutions of the United States and of this State."

The statement refers to a discretionary right not to exclude an unimmunized child where the parent exercises his religious beliefs by objecting to immunization. The statute states that the board "may require immunization." Defendant concedes such requirement to be discretionary. Yet it is argued that where the same statute provides that the board "may exempt" the pupil from immunization because it interferes with his religious principles, in the latter instance the term *may* is to be construed to mean *shall*. The Court rejects such inconsistent interpretations.

I am satisfied that the statute in question vests discretion in the Borough Board of Education to approve or reject the request for exemption from the requirement of immunization as a prerequisite to attendance at school and that the plaintiff Board exercised reasonable discretion in the public interest in rejecting defendant's request and in refusing the three unimmunized children admission to this school.

Appendix F

Defendant urges the inconsistency of the subject statute with the compulsory education law, N.J.S. 18:14-14. There is no merit to this argument. It has been generally held that the prescribing of health measures as a condition of school attendance is not inconsistent with compulsory education laws. 93 A.L.R. 1437.

Additionally, the defendant urges that the Board of Education did not adopt the policy of exclusion pursuant to its by-laws adopted September 24, 1956 which provides that:

> "All policies shall be reviewed annually at the first regular Board meeting of the year after the organization meeting.
>
> "New policies or revisions to existing policies will be adopted by the Board only after they have been received in writing and considered in at least one prior regular or special meeting of the Board."

Suffice it to say that this policy of exclusion was first adopted by the Board on July 27, 1953 and reaffirmed over the years to 1957 inclusive. True, February 24, 1958 was the first meeting after the organizational meeting in any one year that the policy was reviewed and reaffirmed as required by the Board's by-laws. There has been substantial compliance with the by-law provisions. In any event, such provisions are simply directory and not jurisdictional. A technical non-compliance with a directory by-law provision will not vitiate the very plainly expressed policy of the Board adopted pursuant to statutory authority. Furthermore, N.J.S.A. 18:14-64.2 does not specify the mode of action whereby a board of education may exercise its discretionary power of exclusion of unimmunized children from school. Where the statute is silent the delegated power may be exercised by resolution. *Krieger* v. *Jersey City*, 27 N. J. 535, at 542 (1958).

Appendix F

Defendant further argues that the policy adopted by the Board violates the Due Process Clause under the Fourteenth Amendment of the United States Constitution and like guarantees under the State Constitution. She contends that plaintiff in exercising its discretion under the statute sub judice was obliged to conduct a full hearing on her application for exemption, and that the so-called policy relieved the plaintiff of such obligation. The subject statute imposes no requirement of a hearing to be accorded to each applicant for exemption. In any event, the minutes of the June 3, 1957 meeting indicate the attendance of Mrs. Maas at that Board meeting and that she presented her objections as a Christian Scientist to the policy of requiring diphtheria immunization and vaccination as a prerequisite to admission to the Borough school. She was heard. There was no denial of due process. Significantly, all applications for exemption from immunization for religious principles were treated alike. They were uniformly rejected. The Board's action in refusing to recognize religious conviction as a ground for exemption from immunization was non-discriminatory and reasonably designed to prevent disease among the children entrusted to its care.

Finally, defendant contends that plaintiff has not shown such irreparable injury as would entitle it to injunctive relief. She frankly admitted that if the interlocutory injunction were vacated she would resume bringing the unimmunized children to the school in defiance of the reasonable health regulation of the Board of Education. In all probability there would be no resultant disease but the possibility, however remote, is ever present. The facts at bar clearly indicate that the injunctive process must issue in aid of the Board of Education in its effort to prevent disease.

Mrs. Maas is a fine, deeply religious, and charitable woman. In the regrettable conflict between personal re-

ligious convictions and general public welfare the public interest must prevail.

An injunction will issue restraining the defendant from entering the public school with any unimmunized children and restraining defendant from sending any of her unimmunized foster children to the public school. It necessarily follows that defendant's counterclaim asserting that the Board acted in a wilfull and malicious manner is wholly without merit. Judgment of no cause of action will be entered thereon.

The third-party complaint charges that the third-party defendants, members of said Board of Education, acted wilfully and maliciously and that their conduct in refusing to admit the children to school was arbitrary and capricious. The evidence does not sustain, but on the contrary completely refutes such allegations. The motion of the remaining third-party defendants for involuntary dismissal of the third-party complaint is granted.

A form of judgment consistent with the views expressed here today will be submitted.

CERTIFICATE

I, WILLIAM W. POWERS, Certified Shorthand Reporter, do hereby certify the foregoing transcript of Oral Decision taken by me on January 22, 1959 before Honorable Nelson K. Mintz, J. S. C. (T. A.).

Dated: January 29, 1959

WILLIAM W. POWERS

Appendix G

Final Judgment and Injunction After Trial (January 30, 1959)

THE BOARD OF EDUCATION, etc.,

Plaintiff,

vs.

PAULINE MAAS;

Defendant

and

PAULINE MAAS, individually and as Guardian ad Litem, etc.,

Third Party Plaintiff,

vs.

ALTON DICKIESON, etc.

Third Party Defendants.

This matter coming on to be heard in this Court and testimony having been presented on behalf of the plaintiff and defendant (the third-party plaintiff); and the defendant (third-party plaintiff) having rested its case as to liability, whereupon the third-party defendants moved for judgment of involuntary dismissal; and the plaintiff and defendant (third-party plaintiff) having moved for judgment, and the Court thereafter having fully considered the issues raised in this cause and having rendered an oral decision, after the testimony, proofs, and oral argument of the parties as a result of which oral decision the Court disposed of the issue raised by the plaintiff for an injunction against defendant; and having disposed of the

counter-claims filed by defendant against the plaintiff; and having also disposed of the third-party complaint of defendant (third-party plaintiff) against the third-party defendants, who are individual members of the Board of Education of the Borough of Mountain Lakes; and being satisfied that the requirements of the plaintiff, Board of Education of the Borough of Mountain Lakes, that all children be immunized to diphtheria as a prerequisite to their attendance at the public schools of the Borough of Mountain Lakes is a reasonable measure enacted pursuant to State statute and designed to promote the public health, welfare, safety and morals; and being further satisfied that the defendant's unauthorized submission and entrance of EMANUEL AUGOSTOUPOULUS, ANASTASIA MARATOU and DIMITRIOS PAGISTAKIS into the public schools of Mountain Lakes, without proper immunization to diphtheria, was contrary to the requirements of the said Board of Education and that any further or continued violation of said requirements by the defendant will be contrary to the ultimate objectives of the Board of Education in its requirements of immunization as a preventive health measure promulgated in the public interest and cause immediate, harmful, substantial and irreparable injury contrary to the public health, welfare, safety and morals; and the defendant having thereupon moved for an order by this Court suspending the entry or operation of said injunction to be granted against defendant's unauthorized submission and entrance of said children to the public schools of the Borough of Mountain Lakes pending an intended appeal by said defendant; and the Court having heard oral argument in respect of said motion, and being satisfied that the order of suspension sought by defendant would be inimical to the decision of the Court and the public health program of the Board of Education of the Borough of Mountain Lakes, and having duly considered the same;

Appendix G

NOW THEREFORE it is on this 30th day of January 1959,

ORDERED and ADJUDGED that the defendant, Pauline Maas, is hereby enjoined and restrained from attempting to enter or entering EMANUEL AUGOSTOUPOULUS, ANASTASIA MARAJOU and DIMITRIOS PAGISTAKIS, not properly immunized to diphtheria, in any of the public schools in the Borough of Mountain Lakes; and it is further

ORDERED that judgment be entered in favor of the plaintiff and against the defendant, Pauline Maas, on account of all counterclaims asserted against the plaintiff in this suit; and it is further

ORDERED that the motion by third-party defendants, individual members of the Board of Education of the Borough of Mountain Lakes, for Judgment of Involuntary Dismissal of the third-party complaint filed by the third-party plaintiff, Pauline Maas, be and hereby is granted; and it is further

ORDERED that the application and motion of the defendant, Pauline Maas, for an Order suspending the operation of the injunction pending the outcome of an intended appeal, is hereby denied.

NELSON K. MINTZ, J.S.C. T/A

We hereby consent to the form of the within Final Judgment and Injunction.

FRANKEL & FRANKEL
Attorneys for Defendant
Third-Party Plaintiff
By: ESTHER STRUM FRANKEL
A Member of the Firm

LOUIS WINER
Attorney for Third-Party
Defendants

AARON DINES
Attorney for Plaintiffs

Appendix H

Opinion of Judge Mintz on Motion to Dissolve Injunction of October 30, 1957 (September 23, 1958)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MORRIS COUNTY
DOCKET NO. C-297-57

THE BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES,

Plaintiff,

vs.

PAULINE MAAS,

Defendant

and

PAULINE MAAS, individually and as Guardian ad Litem, etc.,

Third Party Plaintiff

vs.

ALTON C. DICKIESON, etc.

Third Party Defendants.

Morristown, New Jersey
September 12, 1958

Before

Honorable NELSON K. MINTZ, J.C.C.

Appearances:

AARON DINES, attorney for plaintiff.

FRANKEL & FRANKEL, by ESTHER S. FRANKEL, attorneys for defendant and third-party plaintiff.

JOHN E. LORD, C.S.R.
Official Court Reporter.

Appendix II

MINTZ, *J.C.C.*

It is settled law that it is within the police power of the State to provide for compulsory vaccination and immunization. It further appears accepted law that a state, consistent with the requirements of the federal Constitution, can delegate to a municipality authority to determine under what circumstances or conditions health regulations shall become regulative and in effect. The principle of law is also clear that it is not a prerequisite that there be an epidemic or threatened epidemic of smallpox, diphtheria, or any other contagious disease in order to permit or justify a board of education to invoke a policy of compulsory vaccination or immunization. Authorities for these propositions of law are: *Sadlock* v. *Board of Education of Carlstadt*, 137 N. J. L. 85; U. S. Supreme Court decision in *Jacobsen* v. *Massachusetts*, 197 U. S. 11; and *Zucht* v. *King*, 260 U. S. 174.

Counsel for Mrs. Maas urges that while these principles are firmly established the effect of N.J.S. 18:14-64.2 is to require the board of education to exempt the pupils from the requirement of compulsory immunization upon a showing by the parent or guardian of said pupils in a written statement that the proposed immunization interferes with the free exercise of his or her religious principles; that this written statement was made by Mrs. Maas and was submitted to the Board of Education of the Borough of Mountain Lakes. The position taken by this defendant is that the Board of Education had no alternative but to waive the requirement of immunization and admit the children into the public school system. I cannot agree with the suggested construction of the statute.

The third paragraph of the statute in question reads as follows: "A board of education may exempt the pupil from the provisions of this section if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization inter-

feres with the free exercise of his religious principles." The Court attaches great significance to the expression *may exempt*. In the Court's considered view, the word *may* indicates honest discretion, complete reasonable discretion, vested in the board of education to determine whether or not in the interest of the public good and the public health and welfare of all the children there shall be a waiver of immunization to certain children on the basis of their religious principles.

That the word *may* is not mandatory but is discretionary and optional with the board of education appears more significant and clear to the Court when one considers the law adopted with respect to immunization to poliomyelitis, and I refer now to N.J.S. 18:14-64.10, in which statute the language is to the effect that a board of education shall exempt the pupil from the provisions of the act upon a written statement signed by the parent or guardian of the pupil that the proposed immunization interferes with the free exercise of religious principles. I need not delve into the reasons for the distinction between the language in the polio case and that in the diphtheria situation.

It has already been suggested that polio vaccine was a newly tried vaccine and perhaps that may have motivated the legislature in indicating to the board of education that the exemption shall prevail where the objection to immunization is urged on religious grounds. Yet the immunization to diphtheria appears to be a well-established immunization, meeting with wide acceptance. But be that as it may, in reading the two statutes the differences become pointed. It appears to the Court that in the polio statute the requirement is a mandatory one. With respect to immunization to diphtheria, the statute vests discretion—reasonable discretion—in the board of education.

Now, it is urged that that discretion, if vested in the board of education by the statute, is arbitrarily exercised. The conduct of the board of education is capricious, com-

pletely unreasonable, that the Board of Education of Borough of Mountain Lakes did not inquire into the religious beliefs of Mrs. Maas. It would appear to this Court that that kind of inquiry is not essential to an exercise of the discretion vested in the board, provided that the discretion is exercised for the protection of the health and safety of the school children.

Doubt has been raised as to whether or not the Christian Science faith supports the view of the defendant. The Court will assume that it does support the position taken by Mrs. Maas in connection with this application. Even if it does, as has already been indicated, the cases hold uniformly—the decisional law—to the effect that the right of religious freedom is a basic right, a fundamental right, a constitutionally guaranteed right; yet it is not a completely absolute one. It is relative. It must be considered in the light of the general public welfare, and, as has been so aptly stated in the Sadlock decision, "To hold otherwise would be to place the individual above the law."

I am satisfied that everyone will agree that the Borough of Mountain Lakes is not alone in requiring compulsory immunization to diphtheria as a prerequisite for the admission of children into the school system. There are many, many municipalities throughout New Jersey and throughout the nation that invoke such a condition, and once that condition has been met each and every child is entitled to enjoy the educational facilities of that particular municipality. There may be differences of opinion as to the propriety of that kind of requirement, but certainly the differences of opinion that may exist among various municipalities and various people does not vitiate the authority of the municipality to provide that kind of prerequisite to admission into the school system.

The Court is inclined to the view that the policy of the Board of Education of the Borough of Mountain Lakes requiring immunization against diphtheria as a prerequisite

to admission into the school system is reasonable one, that it is designed to promote the health of the school children, and that in this respect the religious scruples of any parent or guardian must yield to the police power. The right, as I indicated before, of religious freedom is a relative one. It is not absolute. It has to be exercised with due consideration for the public good. Here the Court concludes that the Board of Education of the Borough of Mountain Lakes exercised reasonable discretion in promulgating a policy requiring immunization against diphtheria as a prerequisite for admission into the school system.

While Mrs. Maas, as the temporary guardian for these children while they are in the United States, submitted a statement indicating her religious convictions would not permit the immunization of these children and in that way complied with the statute, the Court concludes that the statute vests discretion in the board of education to recognize or not to recognize religious convictions as a basis for waiver of the requirement of immunization against diphtheria.

Here the Board of Education has said, "Regardless of the religious beliefs of the child or the guardian we feel in the interest of the public welfare and the health of our children in the school system that immunization against diphtheria is to be required as a prerequisite of every admission into our school system." That is a valid exercise of the police power. It is reasonable.

There are some pertinent facts which I think should be added to the Court's determination. Significantly, they are as follows: It now appears that the three Greek children were not born into the Christian Science faith; that they are here temporarily in the United States and are to return to Greece in a year or so; that the religious conviction urged as a waiver for the requirement of immunization is not that of the children but merely that of the temporary guardian. It further appears that the three children were

vaccinated against smallpox and no objection was urged to that. Of course, the position was taken that that vaccination occurred in Greece. The fact remains that these children were vaccinated against smallpox, which would indicate that that vaccination was not against their religious scruples. From that one could infer that immunization against diphtheria is not against the religious scruples of the three children although obviously it was against the religious convictions of Mrs. Maas.

She is a fine woman. She is to be commended for her charity in taking into her home these three waifs, so to speak, or orphans from Greece, affording them the luxury and comforts of an American home. I admire Mrs. Maas as a woman of great religious conviction.

The Court concludes that the policy of the Board of Education must be respected; that the action of the Board of Education was with due regard to the public health and a valid exercise of the delegated police power to it; and that it had the discretion to refuse to recognize the religious conviction of the temporary guardian as a basis for a waiver of immunization.

The Court concludes also from the examination of the complaint that it is not so palpably defective as to warrant the dissolution of the temporary injunction issued in this matter. Accordingly, the Court will not overrule the decision heretofore made by Judge Stanton in the matter providing for the issuance of a temporary or interlocutory injunction. The motion to modify or dissolve the temporary injunction is denied.

CERTIFICATE

I, JOHN E. LORD, Official Court Reporter, do hereby certify the foregoing transcript of Court's decision taken by me before Honorable Nelson K. Mintz, J. C. C.

JOHN E. LORD

Dated: Sept. 29, 1958

Appendix I

Order Denying Motion to Dissolve Injunction of October 30, 1957 (September 23, 1958)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION MORRIS COUNTY
Docket No. C-297-57
Civil Action

THE BOARD OF EDUCATION, etc., Plaintiff,

vs.

PAULINE MAAS, Defendant,

and

PAULINE MAAS, individually, and as Guardian *ad litem*, etc., Third Party Plaintiff

vs.

ALTON C. DICKIESON, etc. Third Party Defendants.

This matter being made known to the Court on application for a dissolution of the interlocutory injunction previously entered in the cause and the Court having heard the argument of counsel; Frankel and Frankel, Esqs., Esther Strum Frankel, appearing for the defendant, Pauline Maas; and Aaron Dines, appearing for the plaintiff, Board of Education of Mountain Lakes; and having consid-

ered the affidavits and briefs; and having considered the arguments thereupon;

It is on this 22nd day of September, 1958, ORDERED that the defendant's application for dissolution of the interlocutory injunction be and is hereby denied.

NELSON K. MINTZ
J. S. C. T/A

Consent is hereby given to the form of the above Order

FRANKEL & FRANKEL
By ESTHER STRUM FRANKEL
Attorney for the Defendant